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Supreme Court of the United States

OCTOBER TERM, 1948

No. 129

WILLIAM T. URIE, PETITIONER,

vs.

GUY A. THOMPSON, TRUSTEE OF THE MISSOURI PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED JUNE 28, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN CIRCUIT COURT OF CASS COUNTY, STATE OF MISSOURI

WILLIAM T. URIE, Plaintiff,

vs.

GUY A. THOMPSON, Trustee, Defendant

Appeal from the Circuit Court of Cass County, Missouri, Hon. Leslie A. Bruce, Judge.

This cause was instituted in the Circuit Court of Cass County, Missouri, On November 25th, 1941, by plaintiff, William T. Urie, against Guy A. Thompson, Trustee for the Missouri Pacific Railroad Company, being case No. 23740 in said Court. The Fourth Amended Petition for Damages, omitting caption and signatures, is in words and figures as follows:

FOURTH AMENDED PETITION FOR DAMAGES

Plaintiff states that defendant is now and for several years past has been the duly appointed, qualified and acting trustee of the Missouri Pacific Railroad Company; that said railroad and said trustee are engaged in interstate commerce, and said railroad is an interstate railroad; that at the times herein mentioned the plaintiff and defendant [fol. 2] were both engaged in interstate commerce in the operation of interstate trains and cars and engines.

Plaintiff further states that prior to March 31, 1933, said railroad was operated by the Missouri Pacific Railroad Company, a corporation, and that plaintiff worked for said company as a fireman on its locomotives; that on said date said railroad went into bankruptcy under Section 77 of the Federal Bankruptcy Act; that Guy A. Thompson and L. W. Baldwin were appointed trustees for said railroad; that the said Baldwin thereafter resigned and the said Thompson became and is the sole trustee; that said railroad has been operated since March 31, 1933, by said trustees until the said Baldwin resigned and since then it has been operated by the defendant Thompson, that during all of said times the plaintiff worked as an engineer and fireman.

Plaintiff states that for about thirty years prior to May,

1940, he was employed by the defendant railroad chiefly as a fireman on locomotives operating in interstate commerce principally between Joplin, Missouri, and Kansas City, Missouri, during which times he was required by said railroad to work in the cabs and decks of said locomotives, that at all of said times the defendant caused, allowed and permitted noxious, deleterious and poisonous dusts and sand, the same varying from day to day, to enter into said cabs and decks of said locomotives in such quantities as to be harmful to the plaintiff and under conditions which plaintiff during the course of his work was required and did gradually breathe, inhale and absorb; that said dusts and sand which so entered into and permeated said cabs and decks contained a very high percentage or quantity of silica particles or silican dioxide, to-wit; ranging from 80 to 90 per cent, and came from the roadbed and the sanders of said locomotives polluting the air which plaintiff [fol. 3] breathed; that as a result of the cumulative effect of said gradual inhalation and absorbtion of said noxious, deleterious and poisonous substances over a period of years, the plaintiff became disabled on and after May, 1940, and he was caused to suffer the following severe, permanent and lasting illness, bodily injuries and conditions, as follows:

The tissues, structures and membranes of his nose, lungs, air passages, and respiratory system have become permanently inflamed, irritated, impaired and made sore. His ability to breathe has been impaired. He has been caused to suffer from and has a permanent impairment of his lungs and respiratory system, and the functions thereof weakened and damaged. He has been caused to suffer from fibrosis, silicosis, pneumoconiosis, tuberculosis, and silico-tuberculosis of the lungs. His ability to resist disease has been impaired. He suffers from severe pains in his breast and chest, fever, chills, loss of strength, nervousness, sleeplessness, coughing and pleural adhesions. He suffers from great physical pain and mental anguish and will continue to suffer said bodily pain and mental anguish because of said conditions. He has been rendered permanently sick. His ability to work and labor has been impaired and destroyed. He has lost his wages in the sum of about $250.00 per month, and he will continue to lose such wages in the future. Plaintiff states that he first discovered said injury and conditions in May, 1940.

Plaintiff states that the Boiler Inspection Act (45 U.S.C.A. Sec. 23) of February 17, 1911, as amended by the Congress of the United States on June 7, 1924, applicable to the use and operation of said interstate locomotives and appurtenances, provides:

"It shall be unlawful for any carrier to use or permit [fol. 4] to be used on its line any locomotive unless said locomotive, its boilers, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

Plaintiff states that his said injuries and conditions were directly caused by the defendant's violation of said Boiler Inspection Act because said locomotives, which defendant used, were in improper condition and unsafe to operate in the service, and when their conditions constituted an unnecessary peril to plaintiff's life and limb in that when

1. Said dusts and sand would and did enter into and permeate the cabs and decks of said locomotives in quantities that were harmful to the plaintiff to breathe, inhale and absorb.

2. The sanders and sanding devices of said locomotives would loose and let out sand and so that harmful quantities of sand would and did come from the same when set in operation and when (a) the partitions or humps in the sand traps were out of adjustment, or were worn, (b) the sand domes or sand containers or sand boxes were loose at the boiler connections, (c) the sand pipes break or were broken off or were loose or were perforated, (d) the valves or traps holding said said were not in proper mechanical condition and were not properly adjusted.

3. The decks and connections on such locomotives would and did permit said dusts and sand to enter into said cabs [fol. 5] of said locomotives in quantities harmful to plaintiff when (a) the connections between the boiler and the deck were old, worn, or loose, (b) the grate-staff riggings were without covers, or (c) when such covers thereon were

warped, or bent, or did not fit, (d) the floor boards were worn, or loose, or contained open spaces.

4. The defendant failed to maintain said locomotives, cabs, decks, and the places where plaintiff was required to work in safe condition.

Plaintiff further states that because of all of the aforementioned facts he has been damaged in the sum of Sixty-five Thousand ($65,000.00) Dollars.

Wherefore, Plaintiff prays judgment against the defendant in the sum of Sixty-five Thousand ($65,000.00) Dollars, and for his costs of suit.

IN CIRCUIT COURT OF CASS COUNTY

ANSWER TO FOURTH AMENDED PETITION AS AMENDED—Filed September 29, 1945

Comes now Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a corporation, and for his answer to the plaintiff's Fourth Amended Petition, as the same has been amended, denies each and every allegation therein contained except such as are hereinafter expressly admitted.

1. Said defendant admits that he is the duly appointed, qualified, and acting trustee of the Missouri Pacific Railroad Company, a corporation, pursuant to appointment by the United States District Court for the Eastern Division of Missouri under a proceeding in bankruptcy under Section 77 of the Bankruptcy Act.

2. The defendant admits that the plaintiff was employed [fol. 6] by him at various times after the defendant was appointed trustee of the Missouri Pacific Railroad from June 22, 1933 until in 1940 but the defendant denies that the plaintiff did work continuously for him and the defendant denies that the plaintiff became afflicted with silicosis or any other disease by reason of the failure of the defendant to fully perform his duties under the Boiler Inspection Act in connection with the operation of said railroad and denies that he has failed in any way to perform each and every duty cast upon him by law.

3. The defendant, further answering, avers that the plaintiff has filed no claim against the Missouri Pacific Railroad

Company, a corporation, and that the Court in this action has no jurisdiction over any acts complained of by the plaintiff prior to the filing and approval of a petition under Section 77 of the Bankruptcy Act, which said petition was filed and approved by the Eastern Division of the District Court of the United States on March 31, 1933, and this defendant, as such trustee, is not in any event liable for any act committed by the said corporation.

4. Further answering this defendant avers that the Supreme Court has held that the plaintiff could not recover in this action for negligence under the Federal Employers' Liability Act but this defendant avers that, notwithstanding such ruling, the plaintiff's fourth amended petition seeks to charge and recover for negligent acts and the defendant denies each and every such allegation contained in said petition.

5. Further answering, this defendant denies that the locomotives and appliances in use on said railroad were not at said time in the proper and safe condition to operate in the service to which they were put without necessary peril to the plaintiff and denies that the defendant allowed or permitted noxious, deleterious and poisonous dusts and sand [fol. 7] to enter into the cabs and decks of the locomotives used by him in quantities so as to be harmful to the plaintiff, and denies that as a result of the inhalation and absorption of noxious, deleterious, and poisonous substances the plaintiff became disabled.

6. Further answering, the defendant denies that he knew or could have known that the sand used on the locomotives contained a high percentage of silica or that the appliances for sanding on said engines were defective or that the cab was defective but this defendant avers that the locomotives in use by him as such trustee were kept in good mechanical condition and were inspected regularly and before every trip and were inspected by the inspector of the United States, operating under the Interstate Commerce Commission with regularity and the defendant avers that he did at all times comply with the regulations of the Interstate Commerce Commission with respect to the condition of the locomotives operated by him as trustee of the Missouri Pacific Railroad Company and that he in all things complied with the regulations of such Commission and the laws of

the United States with respect to said locomotives and that in fact he did at all times maintain said locomotives in safe condition for operation by the plaintiff.

7. This defendant with respect to the allegation in said petition that the Boiler Inspection Act was not complied with by the railroad Company, and that the operation of locomotives by said company was negligent and was not in compliance with the said Boiler Inspection Act, states the same does not state any cause of action against him as trustee of said railroad and is improperly included in said amended petition and this defendant has sought repeatedly to have the Court strike the allegation with respect to negligence and with respect to the conditions alleged to exist prior to his appointment as trustee stricken from said peti- [fol. 8] tion but has not succeeded in having the same done.

8. Further answering, this defendant denies that the sander and sanding device of said locomotives would lose and let out sand in harmful quantities or that the sand domes or any part of the sanding devices were not in proper mechanical condition or were not properly adjusted and this defendant avers that the sanders were, as required by the Interstate Commerce Commission, regularly inspected.

This defendant denies that the decks and connections of the locomotives permitted dust to enter into the cabs and denies that the connections between the boiler and the deck were old, worn-out, loose or that the grate-staff riggings were without covers or that the covers thereon were warped or bent or did not fit or that the floor boards were worn or loose or contained open spaces but avers the fact to be that the locomotives were at all times maintained in a safe condition and that they were maintained in the condition as required by the Boiler Inspection Act, and the Safety Appliance Act and the orders of the Interstate Commerce Commission.

9. Further answering, this defendant avers that if the plaintiff is suffering from Silicosis that the same is an occupational disease and that the Boiler Inspection Act, under which the plaintiff attempts to state a cause of action against this defendant, does not apply to or relate to such disease; that the Boiler Inspection Act, and the Safety Appliance Act were enacted by the Congress to Cover and include injuries received by employees and that neither of

them can be made the basis of an action for silicosis or any occupational disease.

10. Further answering, this defendant avers that the plaintiff's cause of action, if any, was not instituted until the 25th day of November, 1941, and that the alleged cause of action is barred by the statute of limitations; that the [fol. 9] plaintiff's action was required by Section 56, title 45, U. S. C. A., to have been commenced within three years from the date the cause of action accrued and that any cause of action which the plaintiff had by reason of the alleged violation of the Boiler Inspection Act and of the Safety Appliance Act with respect to the sanders or other parts of locomotives on which he worked was required to be brought within three years of the accrual of said cause of action, and was not so brought and is so barred. The right to sue under the Federal Acts is conditioned upon the suit being brought timely and under said Section 56 above referred to, the right was limited to two years until the amendment of April 11, 1939, when the limitation was extended to three years, and the defendant avers that the plaintiff's action was not brought within either of said periods and the cause of action which he attempts to set out in his fourth amended petition is barred and the petition does not state a cause of action because it fails to affirmatively set out the facts showing that the action was timely begun. The statute of the United States preserves the right as well as the remedy and the plaintiff's alleged cause of action is so barred and the defendant avers that the plaintiff's petition does not state cause of action because it fails to affirmatively set out the facts showing that the action for which recovery is sought was commenced in time.

11. Further answering, the defendant states that whatever injury plaintiff received, if any, was received by him prior to August 11, 1939, and that the plaintiff assumed the risk of injury from the inhaling of the sand or dust since the plaintiff pleads facts showing that he knew, and the defendant avers that he did in fact know, about the use of sand on the engines on which he worked and was fully aware as to their kind and condition and assumed any and all risk or injury therefrom.

[fol. 10] Wherefore, the defendant prays to be discharged herefrom with his costs.

IN CIRCUIT COURT OF CASS COUNTY

MINUTE ENTRY OF TRIAL

This cause came on for trial on the 22nd day of January, 1946, during the January Term of the Circuit Court of Cass County, Missouri, before Honorable Leslie A. Bruce, Judge of said Court, and a jury, the plaintiff appearing in person and by his attorneys, Trusty, Pugh, Green & Trusty, Lathrop Building, Kansas City, Missouri and Louis Wolfe, Joplin, Missouri, and W. M. Anderson, Harrisonville, Missouri, and the defendant appearing by his attorneys, D. C. Chastain and Chester Smith, Dierks Building, Kansas City, Missouri, and Ray L. Shubert, Harrisonville, Missouri, and the following proceedings were had and entered of record on said day and the days hereinafter mentioned, to-wit: * * *

IN CIRCUIT COURT OF CASS COUNTY

INSTRUCTIONS

Instruction Number 1. (Given)

The Court instructs the jury that if you find from the evidence that the Missouri Pacific Railroad is an interstate railroad and that the trustees thereof and the defendant trustee herein, have been operating such railroad as an interstate common carrier in different states, and that the locomotives engines Tom Urie worked on were used by said trustees and the defendant trustee in such interstate commerce, and that during such period of years said trustees and the defendant trustee and Tom Urie, while working on the locomotives referred to, were engaged in carrying on, aiding and furthering interstate commerce, and were engaged in interstate commerce.

Then you are instructed by the Court that,

Under the Act of Congress on which this suit is brought, the trustees and the defendant trustee had the absolute and continuing duty to have such locomotive engines and all [fol. 11] their parts and appurtenances thereof, in proper condition and safe to operate in the service to which they were being put and so that the same could be employed and used in the active service of such interstate commerce without unnecessary peril to the life of Tom Urie, and,

In connection with the foregoing, you are further instructed that if you find from the evidence that during the years that Tom Urie was working for the said trustees and the defendant trustee as such locomotive employee, and the said trustees and the defendant trustee used and required Tom Urie to work on locomotives that were not in proper condition and safe to operate in the service to which they were being put and so as to expose the life of Tom Urie to unnecessary peril in such work, and if you further find from the evidence that said trustees and the defendant trustee used in the sanding appliances on such locomotives and on the roadbed over which said locomotives were being operated the kind of silica material referred to in the evidence, and if you further find from the evidence that such silica material would and did come from such sanding appliances and go under the wheels of such locomotives in such quantities as to create and produce harmful quantities of silica dust, and if you find from the evidence that it did so come through the sanding pipes and under the wheels by reason of such mechanical conditions of such sanding appliances as referred to and explained in the evidence, and if you further find from the evidence that such roadbed material also contained harmful quantities of such silica dusts, and if you further find from the evidence that in the cab decks of locomotives there were such openings and holes at places and in sizes and in such condition as referred to and explained in the evidence, as to allow and permit such silica dusts from under the wheels and from the roadbed to come through such openings and holes and into the cabs in [fol. 12] such quantities as to be harmful to Tom Urie in breathing such dusts while doing his work for said trustees and defendant trustee as a fireman, and if you find from the evidence that such silica dusts from said roadbed and from such sanding appliances when so crushed under said wheels would and did come upward and through said openings in the decks of the cabs on which Tom Urie worked for said trustees and said defendant Trustee, and that it would and did so come into said cabs while said locomotives were in operation and in harmful quantities, and find it would be and was in such quantities as to be harmful and injurious to the lungs of Tom Urie when breathed by him, if you so find, while he was engaged in doing his work for said trustees, and said defendant trustee as a fireman on such locomotives, and if you find from the evidence that Tom Urie

had silicosis or silico-tuberculosis, and if you find from the evidence that Tom Urie became incapacitated from such lung condition, or conditions, in May, 1940, of Tom Urie were caused by and came from and were a direct result of the cumulative effect of breathing such harmful quantities of silica dusts, if you so find from the evidence such facts, and while so working for said trustees and the defendant trustee as a fireman in such locomotive cabs, then it becomes your duty to return a verdict for the plaintiff, Tom Urie, and against the defendant trustee.

Instruction Number 3. (Given)

You are also instructed that in considering the evidence and in determining therefrom the issues under Instruction No. 1 in favor of Tom Urie, you are not to give any consideration to or be influenced by, the question as to whether said trustees and the defendant trustee were negligent or not negligent, because this case is based entirely upon the Federal Boiler Inspection law as explained to you in instruc-[fol. 13] tion number 1, and by reason thereof negligence is not involved and is wholly immaterial.

Instruction No. Four. (Given)

You are also instructed that if you find from the evidence the facts and issues as submitted in instruction Number 1 in favor of Tom Urie, and if you find from the evidence that while Tom Urie was working on the railroad he did not have any lung condition that was disabling and incapacitating prior to April, 1933, and if you find from the evidence that Tom Urie developed and became incapacitated in May, 1940, from silicosis or silico-tuberculosis as submitted in Instruction number 1, then it would be your duty to return a verdict for Tom Urie, even though you find that Tom Urie did have lung trouble or lung ailment while working on the railroad prior to the time said trustees and the defendant trustee herein commenced operating said railroad in April, 1933.

Instruction No. 5. (Given)

The jury is also instructed that if you so find from the evidence the facts and issues for Tom Urie under Instruction number 1, then it would be your duty to return a verdict for him, even though you find from the evidence he breathed

silica dust in harmful or not harmful quantities during years prior to April, 1933.

Instruction Number 6. (Given)

You are also instructed that if you find from the evidence the issues in and under instruction Number 1 in favor of Tom Urie, and that silica dusts did come through openings in the decks of engines and into the cabs Tom Urie worked on, and did so in quantities harmful to him, and that such dusts did cause injuries to Tom Urie's lungs as submitted to you in instruction Number 1, if you so find from the [fol. 14] evidence, then the question and evidence as to when, how and how often the employees of the trustees and the defendant trustee inspected such engines would be no defense.

Instruction No. 7 (Given)

Gentlemen of the jury, you are further instructed that if from the evidence and under instruction Number 1, you find the issues for plaintiff, Tom Urie, and against the defendant, then it becomes your duty to allow him such a sum as you find from the evidence will reasonably and fairly represent the pecuniary value of such damages you find from the evidence Tom Urie sustained and is reasonably certain to sustain in the future as a direct result of such injury and physical disability you find he sustained to his lungs as a direct result of breathing such silica dusts, if you so find from the evidence.

In considering and determining the amount of such sum and such damages, you may take into consideration such physical pain and mental anguish you find from the evidence Tom Urie has suffered to date, and that you find from the evidence he is reasonably certain to suffer in the future, as a direct result of such injury;

Also you should take into consideraton such earnings or wages you find from the evidence Tom Urie has lost to date and as a direct result of such injuries you find he so sustained, not to exceed the sum in evidence and not over $16,750.00;

Also, you should take into consideration such earnings and wages you believe and find from the evidence he is reasonably certain to lose and sustain in the future and as a direct result of such injury you so find;

You should also take into consideration the evidence relating to Tom Urie's age, his habits, his physical condition, both past and present, the nature of the work he was engaged in, his earning capacity at the time of his injury [fol. 15] and all evidence relating to his probable expectancy of life.

Your whole award, if you so find, should be stated in one lump sum and cannot exceed the pecuniary value of such damages and in no event can your award exceed the sum of Sixty-Five Thousand Dollars ($65,000.00), the amount sued for. In mentioning this amount the Court does not mean to direct you to find for the plaintiff in that sum or in any sum, but merely mentions the amount claimed.

Instruction Number 2 (Given)

If you find from the evidence the facts and issues in favor of Tom Urie to be as outlined and submitted in instruction No. 1, then you are instructed that plaintiff has met and carried the burden of proof required under the law and under the instruction herein.

Instruction No. S (Given)

The Court instructs the jury that the burden of proof is upon the plaintiff to prove by a preponderance of the credible evidence in this case that silica dust in sufficient quantities to be harmful to the plaintiff came into the cabs of the locomotives on which the plaintiff worked, and unless you find such to be the facts, then your verdict should be for the defendant.

Instruction Number U (Given)

The Court instructs the jury that if you find and believe from the evidence that the impairment of the lung condition

of the plaintiff, if any, was not caused by reason of his employment by the defendant, then your verdict shall be for the defendant.

[fol. 16] Instruction Number R (Given)

The Court instructs the jury that plaintiff claims in this action that the defendant failed to keep its locomotives upon which the plaintiff worked safe to operate in the service to which the same were put in that the sanders and sanding devices on said locomotives would lose and let out sand so that a harmful quantity of sand would and did come from the same when set in operation, and that the partitions in the sand traps were out of adjustment and were worn, and that the sand domes or sand containers or sand boxes were loose at the boiler connections, and that the sand pipes were broken off or were loose and perforated, and that the valves on the traps that held said sand were not in proper mechanical condition and not in proper adjustment, and that the decks and connections of such locomotives did and would permit sand dust and sand from the said sanders and sanding devices and from the road bed to enter into the cabs of such locomotives on which plaintiff worked when the connections between the boiler and the decks were old, worn or loose and when grate shaker riggin-s were without covers, or when such covers were warped, bent or did not fit, and when the floor boards were worn or loose or contained open spaces, and the plaintiff further claims that by reason thereof plaintiff was caused to breathe silica dust and so to contract silicosis. The Court instructs you that the burden of proof is on the plaintiff to show by a preponderance of the credible evidence in this case that the locomotives of the defendant on which plaintiff worked were defective and unsafe in the manner hereinbefore set forth and charged in plaintiff's petition, and unless you further find that the defendant's locomotives on which the plaintiff worked were defective and unsafe in the particulars herein set out, and that by reason of such defects, if any, silica dioxide dust

[fol. 17] did enter into the cabs of such locomotives in harmful quantities, then you are instructed that you cannot find for the plaintiff and your verdict must be for the defendant.

The Court of his own motion gave the following Instruction:

The Court instructs the jury that nine or more jurors may render a verdict for either party in this case. If all of you agree upon a verdict, your foreman alone will sign it, but if your verdict is rendered by nine or more, and less than twelve jurors, your verdict must be signed by all of the jurors who agree to it.

In Circuit Court of Cass County

Verdict—January 29, 1946

Thereafter, the jury having heard the reading of the instructions, arguments of counsel, retires to consider their verdict. After due consideration on January 29, 1946, the jury then return the following verdict into open Court:

"We, the jury, find the issues in favor of the plaintiff, Tom Urie, and do fix his recovery in the sum of Thirty Thousand Dollars."

W. J. Bradford, Foreman.

In Circuit Court of Cass County

Judgment—January 29, 1946

It is therefore considered and adjudged by the Court that plaintiff have and recover from and against the defendant the sum of $30,000.00, with interest thereon from this date at the rate of 6% per annum together with all of the costs and charges laid out and expended and that he have execution therefor.

[fol. 18] IN CIRCUIT COURT OF CASS COUNTY

MOTION FOR NEW TRIAL.—Filed February 6, 1946

Comes now the Defendant herein and moves the Court to set aside the verdict and judgment entered thereon and grant him a new trial herein for the following reasons:

1. Because the Court erred in overruling Defendant's Motion to Dismiss the Plaintiff's fourth Amended Petition, because the same did not state a cause of action under the Boiler Inspection Act and because said Fourth Amended Petition does not contain any allegation of defects in any safety appliances on any locomotives and because the said amended petition, if it states any cause of action is a departure from the cause of action in the third Amended Petition, and because said Amended Petition fails to state facts upon which relief could be granted.

2. Because the Court erred in overruling the Defendant's motion to require the Plaintiff to make his petition more definite and certain.

3. Because the Court erred in permitting the Plaintiff over the Defendant's objection to amend the fourth amended petition during the trial and because the Court erred in overruling the Defendant's motion to dismiss because the fourth amended petition as amended during the trial failed to state facts upon which relief could be granted.

4. Because the Court erred in admitting incompetent, irrelevant and immaterial testimony offered by the Plaintiff and over the objection and exception of the Defendant.

5. Because the Court erred in failing and refusing to admit relevant and competent testimony offered by the [fol. 19] Defendant.

6. Because the Court erred in refusing to permit the Defendant to introduce and show the regulations of the Interstate Commerce Commission as to the Safety requirements of the engines which regulations were enacted pursuant to authorization in the Boiler Inspection Act and which specify the defects in locomotives which are required to be corrected and erred in refusing the Defendant to offer testimony showing that there were no defects in the locomotives on which the Plaintiff worked, which were prohibited by

the Interstate Commerce Commission orders, and erred in refusing to admit testimony offered by the Defendant of inspection of locomotives by Federal Inspectors as required by the Safety Appliance Act.

7. Because the Court erred in refusing to admit the published reports of the Interstate Commerce Commission showing the results of Federal inspection of locomotives under said act, as far as the same related to the Missouri Pacific Railroad.

8. Because the Court erred in refusing to permit testimony of witnesses to the effect that Plaintiff could not have contracted silicosis from the sand from the sanding devices of the locomotives.

9. Because the Court erred in admitting testimony offered by the Plaintiff over the objection and exception of the Defendant as to sand dust arising from the ballast between the rails of its tracks and from the roadbed; because said testimony did not tend to show that the dust from such ballast was occasioned by any violation of the safety appliances acts, and because there was no evidence as to the size of fineness of the dust.

10. Because the Court erred in submitting the case to the jury; because the Plaintiff failed to show facts upon which [fol. 20] a recovery could be based; because there was no showing as to the concentration of dust that got into the locomotive cabs in which the Plaintiff worked and there was no showing as to the fineness of any dust that got into such cabs or that it created a condition which could have caused the Plaintiff to be afflicted with silicosis; because the Court erred in refusing to permit the Defendant to adequately cross-examine the Plaintiff and in refusing the Defendant to prove by the Plaintiff that he was drawing a pension under the Railroad Retirement Act of $90.00 (ninety) per month; because the Court erred in admitting over the objection and exception of the Defendant, evidence as to the conditions of the locomotive on which the Plaintiff worked while employed by the Railroad and prior to the appointment of the defendant as Trustee thereof.

11. Because the Court erred in admitting evidence as to the conditions under which the Plaintiff worked prior to the time the Defendant was appointed Trustee of the Mis-

souri Pacific Railroad, and erred in overruling the Defendant's objection to such testimony and erred in refusing to limit the Plaintiff to proof of conditions existing since the Defendant's appointment as Trustee of the Missouri Pacific Railroad.

12. Because the Court erred in overruling the defendant's motion to exclude for consideration by the jury, all evidence of the dust coming from the roadbed of the railroad which the Defendant made at the conclusion of the Plaintiff's testimony.

13. Because the verdict is the result of passion and prejudice on the part of the jury.

14. Because the verdict shaould have been for the Defendant and is against the weight of evidence and is against the law and the evidence.

15. Because the verdict is excessive.

16. Because the Court was not impartial but was biased [fol. 21] and prejudiced against the Defendant and the Defendant was not accorded a fair and impartial trial.

17. Because the Court erred in giving, over the objection and exception of the Defendant, instructions one to seven, inclusive, and erred in giving all instructions given on behalf of the plaintiff.

18. Because the Court erred in refusing to give instructions "A" to "Q" and each of them offered by the Defendant.

Wherefore, the Defendant prays that the verdict and judgment entered thereon be set aside and he be granted a new trial herein.

Thomas J. Cole, Ray Shubert, Gardner Smith, D. C. Chastain, Attorneys for Defendant.

IN CIRCUIT COURT OF CASS COUNTY

ORDER OVERRULING MOTION FOR NEW TRIAL—March 18, 1946

Thereafter and on the 18th day of March, 1946, the same being the 17th Judicial Day of the January Term, 1946, of this Court comes parties by their respective attorneys on

defendant's Motion for New Trial heretofore filed herein, which is taken up, heard, and by the Court overruled. To which action of the Court in so overruling said motion the defendant excepted and still excepts.

IN CIRCUIT COURT OF CASS COUNTY

NOTICE OF APPEAL AND APPEAL BOND

Thereafter and on the day last above mentioned comes defendant, by attorney and files herein notice of Appeal. Whereupon the Court fixes appeal bond of the defendant in the sum of $40,000.00, said appeal bond to be filed herein in time provided by law.

[fol. 22] IN CIRCUIT COURT OF CASS COUNTY

NOTICE OF APPEAL—March 18, 1946

Notice is hereby given that Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, the above named defendant, appeals from the judgment heretofore entered in this cause against him on January 29, 1946, to the Supreme Court of the State of Missouri.

Dated: This 18th day of March, 1946.

Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, Defendant, by D. C. Chastain, his attorney of Record.

Which Notice of Appeal was filed in the office of the Clerk of Supreme Court on the 23rd day of March, 1946.

IN SUPREME COURT OF MISSOURI

39908

WILLIAM T. URIE, Respondent,

vs.

GUY A. THOMPSON, Trustee, Appellant

ORDER RE FILING OF TRANSCRIPT—November 18, 1946

Comes now the clerk of the circuit court of Cass County and files herein a transcript of record in the above entitled cause.

[fol. 23] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER ASSIGNING CASE TO DIVISION ONE—January 27, 1947

Now at this day it is ordered by the court that the above entitled cause be assigned to Division One.

IN SUPREME COURT OF MISSOURI

[Title omitted]

ARGUMENT AND SUBMISSION—April 30, 1947

Come now the parties, by their respective attorneys, and after arguments herein submit this cause to the Court.

[fol. 24] IN SUPREME COURT OF MISSOURI

39908

WILLIAM T. URIE, Respondent,

vs.

GUY A. THOMPSON, Trustee of the Missouri Pacific Railroad Company, a Corporation, Appellant

Appeal from the Circuit Court of Cass County

JUDGMENT—September 8, 1947

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Cass County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment; and that the said appellant recover against the said respondent his costs and charges herein expended, and have execution therefor. (Opinion filed).

[fol. 25] IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE, APRIL SESSION, 1947

No. 39,908

WILLIAM T. URIE, Respondent,

vs.

GUY A. THOMPSON, Trustee of the Missouri Pacific Railroad Company, a Corporation, Appellant

OPINION—September 8, 1947

Action under Federal Employers' Liability Act, 45 USCA, Sec. 51 et seq., charging violations of the Boiler Inspection Act, 45 USCA, Sec. 23 et seq. A jury returned a verdict awarding plaintiff $30,000 damages and defendant, trustee of Missouri Pacific Railroad Company, has appealed from the judgment entered.

Heretofore the case has been considered upon the question of the sufficiency of the original petition (Urie v. Thompson, 352 Mo. 211, 176 S. W. (2d) 471), it being held the petition stated facts sufficient to support a recovery for a breach of the Boiler Inspection Act. Upon remand, plaintiff amended his petition to more specifically allege violations of the Act.

The petition as amended contained the allegations that defendant caused, allowed and permitted noxious, deleterious and poisonous dusts and sand, in harmful quantities, the same varying from day to day, to enter the cabs and decks of locomotives in which plaintiff was required to work as a fireman, whereby plaintiff gradually inhaled silica particles resulting in silicosis, or silico-tuberculosis—defendant's locomotives were unsafe to operate in the service and constituted an unnecessary peril to life and limb in that dusts and sand would and did enter into and permeate the cabs and decks in quantities harmful to [fol. 26] plaintiff to breathe; the sanding devices would loose sand so that harmful quantities would come from the same when set in operation; the sand domes were loose at the boiler connections; the sand pipes were broken off, or were loose or perforated; the traps holding sand were not in proper mechanical condition and were not properly adjusted; the connections between the boiler and the deck were old, worn, or loose; the grate-staff riggings were without covers, or the covers were warped, or bent, or did not fit; the floor boards were worn, or loose, or contained open spaces; and defendant failed to maintain his locomotives, cabs and decks where plaintiff was required to work, in safe condition.

Defendant denied the locomotives were in an unsafe condition; and denied plaintiff became disabled as a result of the inhalation of any deleterious substance entering into the cabs and decks of defendant's engines. Defendant alleged the locomotives were regularly inspected by inspectors of the Interstate Commerce Commission, and that all regulations of the Commission had been complied with; averred silicosis is not within the purview of the Boiler Inspection Act; and further interposed the plea of limitation of action (45 USCA, Sec. 56).

On this appeal there are thirty-two assignments of error. Not all of the assignments were developed in appellant-

defendant's brief by citation of authorities and argument. The assignments of error neither briefed nor argued are, for the purpose of this appeal, abandoned. Petty v. Kansas City Public Service Co. (Mo. Sup.), 198 S. W. (2d) 684; Supreme Court Rule 1.08. The scope of review of the instant case, an action at law tried upon facts with a jury, is generally governed by Sections 123 and 140, Civil Code of Missouri, Laws of Missouri, 1943, p. 370 and pp. 395-6, and Rule 1.08, supra, but with a regard for Supreme Court Rule 3.27. See In re Duren —— Mo. ——, 200 S. W. (2d) 343, treating with a case tried upon facts without a jury.

It is said by defendant that the petition does not state and the evidence does not support a claim under the Boiler Inspection Act; and that plaintiff's action is barred by limitation; and errors are assigned in the admission and exclusion of evidence, and in instructing the jury.

[fol. 27] Plaintiff, now 57 years old, had commenced work for the Missouri Pacific Railroad Company July 4, 1908, and left defendant's employment in May, 1940. He was principally employed as a fireman on engines on the line from Joplin to Kansas City. He had been interested in a mine and, early in his employment and when he was on the extra board, ran a hoister and pumped water for about sixty days down at "Tan Yard Holler." He also worked out at "Smeltry Hill" for about three weeks; "put in a pump and operated it a while." He had not worked as a "regular miner, down in the mine getting out ore." In 1914 he had "walking typhoid"; he "laid off" and went to Oklahoma, being away from his work with the Missouri Pacific five or six months; however, he worked on all but about 60 days of that time for a contractor in the Oklahoma oil fields.

The sand used in the sanding devices of defendant's locomotives was "tailings" from the lead and zinc mines of Webb City and Carterville, Jasper County. The tailings were also used as ballast on the roadbed. Various samples of the tailings or sand contained 97.2% to 97.87% free silicon dioxide. Sand used in the engines was finely ground. A sample of sand exhibited by defendant and stated to have been crushed under the wheels of a locomotive contained 97.8% silicon dioxide—96% passed through a 20-mesh screen, 74% passed through a 40-mesh screen, 46% passed through an 80-mesh screen, 45% passed through a 100-mesh screen, 29% passed through a 200-mesh

screen, and 9% passed through a 325-mesh screen. 8.25% of the particles were of 10 microns size or smaller. Of the sand exhibited by defendant (which, it was stated, had not been crushed beneath the wheels of a locomotive), no particles passed through a 325-mesh screen. A witness for plaintiff, testified of a test made by him at plaintiff's request. Sand, stated to have been procured from defendant's sand house at Joplin, was placed in a glass jar. The jar and contents were shaken and a sample of the air "in the space at the top of the jar" was found to contain 5,100,000 particles smaller than 10 microns, and 750,000 particles smaller than 5 microns per cubic foot of air. (Physicians, witnesses for plaintiff, testified the specific concentration of [fol. 28] particles under 10 microns in size and of 97% free silica which may "be present in the air a person breathes without harmful effects" is 3,000,000 to 5,000,000 per cubic foot.) The witness was asked, "If you had this sand blown from the sander on the engine two-thirds of the length of the engine by air pressure, if it was this kind of sand, and it was blown that distance, you would have a much lesser percentage of particles smaller than ten microns? A. My answer would be conjecture. I have had no experience in testing samples under those conditions. The concentration present in the air under those conditions would be the result of many factors."

Plaintiff testified that in May, 1940, he commenced to have pains "all through" his chest; he got very short of breath and "kept getting a little worse and a little worse." He consulted a physician who took X-ray photographs; and later, June 21st, plaintiff reported to the hospital of the Missouri Pacific Association at St. Louis for examination. X-ray films disclosed a mottled "snow storm effect" (diffused throughout the upper two-thirds of both lungs); said by experts, witnesses for plaintiff, to be indicatory, in their opinion, of nodules formed in the calcification of the pulmonary fibrosis, scar tissue, formed after a person has harmfully inhaled silica dust into the lung structure itself. Plaintiff's experts "came to the conclusion the man was suffering from a disease known as silicosis."

Physicians, specialists in diseases of the lungs, witnesses for defendant, were of the opinion plaintiff suffered pulmonary tuberculosis; that the X-ray photographs disclose a tuberculosis infection that is widespread throughout the upper and lower lobes equally; that X-ray findings do not sug-

gest silicosis; and that the small calcified "snow storm effect" areas are typical of what are called Ghon's nodes, that is, simply a tuberculosis of the lungs which heals out with small circumscribed places "that are all the same size, and they heal out, more or less, with a calcification in the area." [fol. 29] Bruce Brill, a witness for plaintiff, testified he had worked at the Missouri Pacific roundhouse at Joplin for about 18 years and until November 4, 1942; that the "engines that came in * * * I would say most of them, at least three out of five, would have the sanders reported in bad order * * * maybe it was a broken nipple, something in the dome, or a loose connection." A broken nipple would cause the sand to dribble onto the rails under the drivers, and the "speed would suck it up into the cab after it was ground under the wheels." The dust would be sucked in "through the deck and around the boiler head or openings in the grate shakers." When the witness cleaned out the cabs he found sand particles and roadbed dust. Plaintiff had worked on coal burning engines. When shoveling coal he was "something like two feet" from the grate shaker openings. Some coal dust would be stirred up, but "we had a hose there to keep it dampened down good." (The relationship that exists between the breathing of inorganic dust and tuberculosis has always been believed to be a close one. However, there is a strong tendency to assume that coal dust of itself is relatively harmless and that when mixed with silica has a retarding influence not only on the effects of the silica but also on the tubercle bacillus. Norris-Landis, Diseases of the Chest, 6th Ed., p. 578; Rubin, Diseases of the Chest, p. 340.) Plaintiff testified the (sand) dust would "come up through the openings in the cab floors, around the grate shaker riggings and the stoker head in the deck of the engine on each side of the fire door against the boiler head. * * * Sometimes there would be wide cracks between the boiler head and the deck floor where the bolts were broken off and it was worn and loose. The deck boards would be cracked and sometimes slivered out, and it would come through any openings like that; * * * would collect on the lights; * * * would get our clothing very dusty; * * * make your mouth and nose very dry."

Negligence is not the basis for liability under the Boiler Inspection Act. Instead, it "imposes upon the carrier an [fol. 30] absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate * * * without unnecessary

peril to life or limb." Southern Ry. Co. v. Lunsford, 297 U. S. 398, 56 S. Ct. 504. See also, Lilly v. Grand Trunk Ry. Co., 317 U. S. 481, 63 S. Ct. 347, and cases therein cited. The Interstate Commerce Commission is authorized to set the standards of compliance by prescribing "rules and regulations by which fitness for service (of locomotives, tenders and their appurtenances) shall be determined," Napier v. Atlantic Coast Line, 272 U. S. 605, 47 S. Ct. 207, provided the Commission finds such are required to remove unnecessary peril to life or limb. The Act is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. Lilly v. Grand Trunk R. Co., supra. In the Lilly case the Supreme Court of the United States observed the Interstate Commerce Commission had set a standard by promulgating a rule (No. 153) that the "top of tender behind the fuel space shall be kept clean * * *." The petitioner, Lilly, fell from the top of the locomotive tender. "As to the circumstances of the accident, petitioner testified that the top of the tender (over an area of some six square feet) was covered with ice." Standing on the ice petitioner reached (by means of a hooked rod) for a water spout preparatory to filling the tender's tank with water. As he pulled the spout, the rod's hook slipped on the spout, and his feet simultaneously slipped on the ice, causing him to fall to the ground. Since the jury found the tender did not leak, the condition was not due to any mechanical defect; nevertheless, the top of the tender had not been kept "clean" as required by Rule 153, and the foreign matter, ice, caused the "accident." The injury in the Lilly case was *accidental.* In the former review (Urie v. Thompson, supra) this court ruled with the Lilly case that (in order to state a violation of the Boiler Inspection Act) it is unnecessary that there be alleged (or shown) a *defect* in construction or mechanical operation. It was said, a sanding device "which is out of adjustment is an *unsafe* appliance, the very thing that the [fol. 31] carrier, under the Boiler Inspection Act, *insures* against." In the former review this court did not treat with contention that "silicosis" is not an evil at which the Act is aimed. If none of the consequences which a statutory enactment was designed to guard against has resulted from its breach, such a breach does not constitute an actionable wrong, even though some other injurious consequence has resulted. 38 Am. Jur., Negligence, Sec. 163, p. 834; Vol. II,

Restatement of the Law of Torts, Sec. 286, p. 752, et seq.; 45 C. J., Negligence, Sec. 111, pp. 726-7.

This brings us to a more particular examination of appellant-defendant's contention that the Boiler Inspection Act is designed to guard against "accidental" injury, and that silicosis is not within the purview of the protection of the Act. Respondent-plaintiff has reminded us of Rules 101, 116(a), and 120, approved by orders of the Interstate Commerce Commission. Rule 101 provides that the railroad company will be held responsible for the general design, construction, and maintenance of locomotives and tenders under its control. Rule 116(a) provides that cabs shall be securely attached or braced and maintained in a safe and suitable condition for service; and cab windows shall be so located and maintained that the enginemen may have a clear view of track and signals from their usual and proper positions in the cab. And Rule 120 provides that locomotives shall be equipped with proper sanding apparatus, which shall be maintained in a safe and suitable condition for service, and tested before each trip. Sand pipes must be securely fastened in line with the rails. Generally, these rules appear to be directed to the safe construction, and the maintenance of the locomotive and its appurtenances or equipment in a safe and suitable condition for the operational service "to which the same are put", all to the end "that the same may be employed in the active service without unnecessary peril to life and limb." 45 U S C A, Sec. 23, infra. The prime purpose of the Act being the protection of employees (and others) by requiring the use of safe equipment, the Act should be given liberal, not a narrow or strict, construction. Yet the Act, imposing an absolute duty to use safe equipment, should justly be interpreted as imposing the duty to keep the equip-
[fol. 32] ment safe in the protection from those injuries within the fair meaning of the language used. Compare Johnson v. Southern Pacific R. Co., 196 U. S. 1, 25 S. Ct. 158. See also discussion of interpretation of Statutes, United States v. American Trucking Associations, 310 U. S. 534, at pages 543-4, 60 S. Ct. 1059, at pages 1063-4. It is fairly and reasonably to be understood from the reading of the Rules and the Section that the purpose of the Act is to impose the absolute duty to so maintain the locomotive, and all parts and appurtenances thereof for service that unnecessary risks of accidental injury are avoided. There

seems to be no expression reasonably indicatory of a purpose to require the engine and its appurtenances to be so constructed and maintained as to protect against injuries due to the presence of dusts in the cabs of locomotives. There is a definite differentiation, generally, in the adjudicated cases, between "accidental injury" (accidental in the sense that the injury is attended by force or violence), and pneumoconiosis (including silicosis), which is evidenced by pathological changes in lung structure attributable to the effects of the inhalation of harmful dusts over a period of time. Vol. 1, Words and Phrases, Accident, p. 250, particularly at page 299 et seq.; Smith v. Harbison-Walker Refractories Co., 340 Mo. 389, 100 S. W. (2d) 909; Bolosino v. Laclede-Christy Clay Products Co. (Mo. App.), 124 S. W. (2d) 581; Wurst v. American Car & Foundry Co. (Mo. App.), 103 S. W. (2d) 6; Billo v. Allegheny Steel Co., 328 Pa. 97, 195 Atl. 110. See also, Norris-Landis, Diseases of the Chest (6th Ed.), p. 568; Mansfield v. Wagner Electric Mfg. Co., 294 Mo. 235, 242 S. W. 400.

Defendant cites the case of Napier v. Atlantic Coast Line, 272 U. S. 605, 47 S. Ct. 207. The reading of this case does disclose a tacit recognition of the validity of the States' argument that the federal regulation endeavors solely to "prevent accidental injury in the operation of trains." The subjects of the state statutes involved in the case, and of the Boiler Inspection Act were the same—"*the equipment of locomotives.*" It was held that state legislation (although endeavoring to prevent sickness and disease and *affecting safety*, if at all, only incidentally) was precluded, [fol. 33] "because the Boiler Inspection Act, as we construe it, was intended to occupy the field." The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or *however different their purpose*" (our italics). The Commission's power is ample to prescribe equipment promoting health, because keeping firemen and engineers in good health, like preventing excessive fatigue, through limiting the hours of service", *clearly promotes safety.* After the Napier decision there were further subsections added to Rule 116. We particularly notice subsection (g), added May 7, 1928, "Unnecessary or excessive openings in locomotive cabs around reverse levers, grateshaker levers, pipes, rods, running boards,

doors, windows, between cab and boiler, around wind sheets, or at any other place in cab or deck where rain, snow, or wind may enter shall not exist on any locomotive used during the period from November 1 to April 1 within the territory (including Missouri) specified in paragraph (d)." Such subsection was manifestly added in the purpose of protecting from inclement weather generally attending the stated period of the year in the stated territory. By thus being protected from the discomfort and distraction of the rain, snow and wind the engineer and fireman are more attentive—this clearly *promotes safety.* Napier v. Atlantic Coast Line, supra.

Plaintiff has cited the case of Sadowski v. Long Island R. Co., 292 N. Y. 448, 55 N. E. (2d) 497, wherein a recovery under the Federal Employers' Liability Act was upheld for silicosis with tuberculosis superimposed. A substantial part of plaintiff's duties was to fire stoves and handle sand, in a sand house, in a sand-drying and screening process preparatory for the use of the sand in defendant's locomotives. The action was based upon negligence. Defendant should have taken precautions to protect plaintiff from the consequences which might reasonably be anticipated from being required to work "in more or less of a cloud of silica dust which enveloped him and which he necessarily in-[fol. 34] haled." This case is not helpful upon the question whether an injury, a so-called "occupational disease", as distinguished from accidental injury, is within the protection designed to be afforded by the Boiler Inspection Act.

At the first national convention of state railroad commissioners held in March, 1889, a resolution was adopted, "Whereas thousands of railroad employees are killed or injured in coupling or uncoupling freight cars in interstate traffic and in handling the brakes of such cars, and most of these accidents can be avoided by the use of uniform automatic couplers and train brakes; * * * Resolved, that we do respectfully and earnestly urge the Interstate Commerce Commission to consider what can be done to prevent loss of life and limb in coupling and uncoupling freight cars in interstate commerce. * * *" The requirements of the various states relating to the equipment were then conflicting and diverse. President Harrison, in his final message to Congress, December 5, 1892, said, "Statistics * * * show that during the year ending June 30, 1891 there were forty-seven different styles of car couplers reported to be

in use, and that during the same period there were 2,660 employees killed and 26,140 injured. Nearly sixteen per cent of the deaths occurred in the coupling and uncoupling of cars, and over thirty-six per cent of the injuries had the same origin." To meet this situation, Congress, in 1893, enacted the original Safety Appliance Act, and somewhat later, and for like reasons, the Hours of Service Act, followed in time by the Ash Pan Act, and the Boiler Inspection Act. See Vol. 2, Roberts, Federal Liabilities of Carriers (2d Ed.), Sec. 501, pp. 1023-1026. The origin and history of the Boiler Inspection Act is also stated in Napier v. Atlantic Coast Line, supra (272 U. S. at pages 608-609). The Boiler Inspection Act, as enacted in 1911, applied only to the boiler. Its purpose was "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto." 36 Stat. 913. The Act was extended by [fol. 35] amendment in 1915 to include the entire locomotive and tender and all parts and appurtenances. 38 Stat. 1192. In 1924, the Act was further amended, 43 Stat. 659, so that Section 2 thereof reads, "That it shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions (See Sections 28, 29, 30 and 32; 45 U S C A) of this Act and are able to with-tand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." 45 U S C A, Sec. 23. We see it is provided in Section 8 of the Act, 45 U S C A, Sec. 32, "In the case of *accident* resulting from failure from any cause of a locomotive boiler or its appurtenances, *resulting in injury or death* * * * a statement forthwith must be made in writing of the fact of such accident" (our italics). In a footnote at page 609 of 272 U. S. (Napier v. Atlantic Coast Line, supra) are listed some of the various devices the Interstate Commerce Commission had required as equipment for the locomotives used in interstate commerce. And the more recent rules and regulations for in-

spections of locomotive boilers and their appurtenances are found in 49 C. F. R., Section 91.1 et seq., page 1236 et seq. From these rules it is apparent the Interstate Commerce Commission has looked to the safety of the employee as purposed by the Act from the standpoint of safety from accidental injury in the operation of trains. It seems to us the Act (considering the language of the Act itself, its preamble, its history, and its ancillary regulations) is aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts. [fols. 36-37] The judgment should be reversed.

It is so ordered.

Paul Van Osdol, Commissioner.

IN THE SUPREME COURT OF MISSOURI

ORDER ADOPTING OPINION

Per Curiam: The foregoing opinion by Van Osdol, C., in Division One, is adopted as the opinion of the Court En Banc. All of the Judges concur.

[fol. 38] IN THE SUPREME COURT OF MISSOURI

[Title omitted]

MOTION OF RESPONDENT FOR REHEARING OR IN THE ALTERNATIVE TO TRANSFER THE CAUSE TO THE COURT EN BANC—Filed September 23, 1947

Comes now the Respondent herein (hereinafter referred to as Plaintiff) and moves this court to grant him a rehearing or in the alternative to transfer the cause to the court en banc for the following reasons, to-wit:

I

The court has overlooked prior controlling decisions of this court in its present opinion because it fails to follow the law as declared by it on prior appeal in Urie v. Thompson, 325 (Mo.) 211, 176 SW 2d 471, which opinion became controlling upon this court on this appeal.

II

This court misconstrued the facts and the law in holding that the former opinion did not pass upon the contention that silicosis was not an evil at which the Boiler Inspection Act was aimed since the former opinion passes on the precise point, l.c. 475, and since the opinion was on demurrer to the petition, it was a direct holding in favor of plaintiff *"on every issue that could have been raised under the demurrer."*

III

This court overlooked the material rule of law that "questions adjudicated on former appeal are not open for examination on this appeal." State ex rel Winkle Etc. Co. v. U.S.F.G. Co. (Mo.) 40 SW 2d 1050, l.c. 1052.

[fol. 39]

IV

This court has overlooked controlling decisions holding that a State court is bound to follow the interpretation of Federal Statutes placed upon them by the Federal Courts, whether or not the Federal conclusions seem wise.

V

This court has overlooked or misconstrued controlling opinions of the Supreme Court of the United States holding that violation of a Federal Safety Appliance Act gives rise to a right of recovery if such violation is the proximate cause of an injury, regardless of whether or not the act was passed for the purpose of protecting against the particular injury suffered

L & N R. R. Co. v. Layton, 244 U.S. 617, 37 S.Ct. 456.
Davis v. Wolfe, 263 U.S. 239, 44 S.Ct. 64.

VI

This court has overlooked controlling decisions of the Supreme Court of the United States which hold that, "in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the wrong done to him contrary to said law." The opinion denies recovery for a wrong done in violation of a

statute enacted specially for a class to which plaintiff belonged.

Texas and Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 36 S.Ct. 482.

San Antonio Ry. Co. v. Wagner, 241 U.S. 476, 36 S.Ct. 626.

VII

The opinion overlooks controlling decisions of the Supreme Court of the United States holding that the Boiler Inspection Act was passed to promote safety, "by preventing the impairment of health of engineers * * *." The present opinion is in direct conflict therewith by holding that such act was only intended to protect against "accidental injury."

U. S. v. B. & O. R. Co. et al., 293 U.S. 454, 55 S.Ct. 268.

VIII

The opinion has overlooked or misconstrued controlling Federal Decisions by attempting to construe the Boiler Inspection Act separate and apart from the Federal Employers' Liability Act, when such controlling decisions hold that the acts are in pari materia.

San Antonio Etc. Ry. v. Wagner, 241 U.S. 476, 36 S.Ct. 626.

[fol. 40] IX

The opinion overlooks or misconstrues controlling Federal decisions in making a distinction between a right of recovery under the Federal Employers' Liability Act for negligence and for violation of Safety Appliance Acts.

X

The opinion overlooks controlling Federal decisions holding that injury as a result of a violation of Federal Safety Appliance Acts gives rise to a cause of action under the last part of paragraph one of the Federal Employers' Liability Act for negligence.

San Antonio Etc. Ry. Co. v. Wagner, 241 U.S. 476, 36 S.Ct. 626.

McCarthy v. Penna. R. Co. (C.C.A. 7) 156 Fed. 2d 877.

XI

The court, in recognizing a right of recovery for injury from the slow inhalation of dust by reason of negligence under the Federal Employers' Liability Act, but denying such right of recovery under the Boiler Inspection Act, overlooks controlling decisions holding that a violation of a Federal safety appliance act constitutes negligence within the meaning of paragraph one of the Federal Employers' Liability Act, which latter act authorizes a recovery for such negligence. Authorities supra.

XII

The court has misconstrued controlling Federal decisions in denying a right of recovery in the present case for injury from the gradual inhalation of dust when this is an action for negligence within the meaning of the Federal Employers' Liability Act and controlling decisions under that act recognize such right of recovery. Authorities supra.

XIII

The opinion in the present case is in direct and irreconcilable conflict with the opinion on prior appeal.

XIV

An important Federal question is involved on a matter never before directly adjudicated and the two opinions of this same court should be reconciled to the end that the law may be correctly established and justice done.

[fol. 41]

XV

The point upon which the case was decided by this court was not developed in the original briefs because the matter was considered to be res adjudicata on former appeal and many controlling cases were not heretofore brought to the attention of the court.

Wherefore, respondent prays that this court enter an order granting a rehearing or in the alternative that the cause be transferred to the court en banc so that an authoritative and controlling decision by the court en banc may be rendered after a full development of controlling authorities on the Federal points herein involved.

Respectfully submitted, Trusty & Pugh, Louis N. Wolf, by Guy W. Green.

[fol. 42] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING OR TO TRANSFER TO COURT EN BANC AND ORDER TRANSFERRING CAUSE TO COURT EN BANC—October 13, 1947

Now at this day, the Court having seen and fully considered the motion of the respondent for a rehearing herein, or to transfer this cause to the Court en Banc, doth order that said motion be, and the same is hereby overruled. It is further ordered by the Court that this cause be, and the same is hereby transferred to the Court en Banc on the Court's own motion.

IN SUPREME COURT OF MISSOURI

[Title omitted]

ARGUMENT AND SUBMISSION—February 2, 1948

Come now the parties, by their respective attorneys, and after arguments herein submit this cause to the Court.

[fol. 43] IN SUPREME COURT OF MISSOURI

JUDGMENT—March 8, 1948

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Cass County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment; and that the said appellant recover against the said respondent his costs and charges herein expended, and have execution therefor. (Opinion filed.)

(Note: The Divisional Opinion was adopted by the Court en Banc, and appears at Page — of this transcript.)

[fol. 44] IN THE SUPREME COURT OF MISSOURI
EN BANC

[Title omitted]

MOTION OF RESPONDENT FOR REHEARING—Filed March 23, 1948

Comes now the Respondent herein and moves this court en banc to grant him a rehearing for the following reasons, to-wit:

I

This court has overlooked controlling decisions holding that a State court is bound to follow the interpretation of Federal Statutes placed upon them by the Federal courts, whether or not Federal conclusions seem wise.

Mooney v. Terminal R. Ass'n., 352 Mo. 1080, 186 S.W. 2d 450.

II

The opinion has overlooked or misconstrued controlling Federal decisions by construing the Boiler Inspection Act separate and apart from the Federal Employers' Liability Act, when such controlling decisions hold that the acts are in pari materia and must be construed together since the Federal Employers' Liability Act is the only act conferring a right of action.

San Antonio Etc. Ry. Co. v. Wagner, 241 U.S. 476, 36 S.Ct. 626.

Tipton v. A. T. & S. Fe Ry. Co., 298 U.S. 141, 56 S. Ct. 715.

Chap. 29 Mo. R. S. A.

B. & O. R. Co. v. Groeger, 266 U.S. 521, 45 S. Ct. 169, l.c. 172.

[fol. 45] San Antonio, etc., Ry. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626.

Lilly v. Grand Trunk R. Co., 317 U.S. 480, 87 L. Ed. 411.

McCarthy v. Pa. R. Co., (C.C.A.) 156 F. 2d 877, l.c. 879-880.

III

The opinion overlooks, or misconstrues, controlling Federal decisions in making a distinction between a right of recovery under the Federal Employers' Liability Act for negligence and for violation of Safety Appliance Acts.

IV

The opinion overlooks controlling Federal decisions holding that "injury" as a result of a violation of Federal Safety Appliance Acts gives rise to a cause of action under the last part of paragraph one of the Federal Employers' Liability Act for negligence.

San Antonio Etc. Ry. Co. v. Wagner, 241 U.S. 476, 36 S. Ct. 626.

McCarthy v. Penna. R. Co. (C.C.A. 7) 156 Fed. 2d 877.

V

The court, in recognizing a right of recovery for injury from the slow inhalation of dust by reason of negligence under the Federal Employers' Liability Act, but denying such right of recovery under the Boiler Inspection Act, overlooks controlling decisions holding that a violation of a Federal Safety Appliance Act constitutes negligence within the meaning of paragraph one of the Federal Employers' Liability Act, which latter act authorizes a recovery for such negligence. Authorities supra.

VI

The court has misconstrued controlling Federal decisions in denying a right of recovery in the present case for injury from the gradual inhalation of dust when this is an action for negligence within the meaning of the Federal Employers' Liability Act and controlling decisions under that act recognize such right of recovery. Authorities supra.

VII

This court has overlooked or misconstrued controlling opinions of the Supreme Court of the United States holding that violation of a Federal Safety Appliance Act gives rise to a right of recovery if such violation is the proximate cause of an injury, regardless of whether or not the act [fol. 46] was passed for the purpose of protecting against the particular injury suffered.

L. & N. R. R. Co. v. Layton, 244 U.S. 617, 37 S.Ct. 456.
Davis V. Wolfe, 263 U.S. 239, 44 S.Ct. 64.

VIII

This court has overlooked controlling decisions of the Supreme Court of the United States which hold that, "in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the wrong done to him contrary to said law." The opinion denies recovery for a wrong done in violation of a statute enacted specially for a class to which plaintiff belonged.

Texas and Pacific Ry. Co. v. Bigsby, 241 U.S. 33, 36 S. Ct. 482.

San Antonio Ry. Co. v. Wagner, 241 U.S. 476, 36 S.Ct. 626.

IX

The opinion overlooks controlling decisions of the Supreme Court of the United States holding that the Boiler Inspection Act was passed to promote safety, "by preventing the impairment of health of engineers * * *." The present opinion is in direct conflict therewith by holding that such act was only intended to protect against "accidental injury."

U. S. v. B. & O. R. Co. et al., 293 U.S. 454, 55 S.Ct. 268.

Napier v. At. Coast Line R. Co. et al., 272 U.S. 605, 47 S. Ct. 207.

X

The opinion conflicts with controlling decisions in holding that the Boiler Inspection Act limits and restricts the word "injury" as used in the Federal Employers' Liability Act to "accidental injury" when the courts have held "injury" to be broad enough to cover injury from gradual accumulation of deleterious substances.

XI

The court has misconstrued the law in holding that Section 8 of the Boiler Inspection Act modifies and restricts the broad benefits conferred by Section 2 thereof, when in fact they are separate and distinct and Section 2 would be fully operative without the rest of the act.

Cong. R., Vol. 46, part 1, p. 729, January 10, 1911.

Lilly v. Grand Trunk Western R. Co., 317 U. S. 480, 87 L.Ed. 411.

Kilburn v. Chi., M. & St. P. Ry. Co., 232 S.W. 1017.
In re Claim of A. E. Clark, 27 Op. At. Gen. 346 (Opinions of Solicitor General, Dept. of Labor, April, 1915).
In re Claim of Willard E. Jule, July 28, 1913, Opinions of Solicitor, Dept. of Labor, April, 1915, p. 261.

[fol. 47] Wherefore, Respondent prays that this court enter an order granting a rehearing.

Respectfully submitted, Trusty & Pugh, Louis N. Wolf, by Guy W. Green.

[fol. 48] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—April 12, 1948

Now at this day, the Court having seen and fully considered the respondent's motion for a rehearing in the above entitled cause, doth order that said motion be, and the same is hereby overruled.

No. 39908

IN THE SUPREME COURT OF MISSOURI—EN BANC

[Title omitted]

MOTION TO STAY MANDATE—Filed April 22, 1948

Comes now William T. Urie, Respondent in the above entitled cause, and moves the Court to stay the mandate for ninety (90) days in the above entitled cause, to give Respondent time to prepare petition for Certiorari in the Supreme Court of the United States.

Trusty & Pugh, Louis N. Wolfe, Guy W. Green, Attorneys for Respondent, William T. Urie.

Receipt of copy of within motion acknowledged this 21st day of April, 1948. Patterson, Chastain, Cowherd & Smith, Attorneys for Appellant.

[fol. 49] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER STAYING MANDATE

Comes now the respondent, by attorney and files herein a motion to stay mandate in the above entitled cause, which motion is by the Court examined and ordered sustained for a period of ninety days from date of overruling the motion for a rehearing.

[fol. 50] IN THE SUPREME COURT OF MISSOURI—EN BANC

[Title omitted]

PRAECIPE—Filed April 22, 1948

To the Clerk of the Supreme Court of Missouri:

Please prepare a transcript of the record in the above cause to be sent to the Supreme Court of the United States in connection with appellant's application for writ of certiorari, including in said transcript the following:

1. Filing of the notice of appeal, together with copy thereof and date of filing.
2. Appellant's transcript on appeal filed in this court, and date of filing.
3. Case assigned to Division Number One.
4. Case argued and submitted.

[fol. 51] 5. Record of reversal of the judgment, and the date thereof.

6. Opinion of the court.
7. Motion of respondent for rehearing or in the alternative to transfer the case to the court en banc, and date of filing.
8. Suggestions of appellant and respondent on the above motion, together with the dates of filing.
9. Record of the overruling of the motion, together with the date thereof.
10. Record of transfer of the case to the court en banc on court's own motion, together with the date thereof.
11. Case assigned to Supreme Court en banc.
12. Case argued and submitted to Supreme Court en banc.

13. Record of reversal of judgment by court en banc, and date thereof.
14. Opinion of the court.
15. Motion of respondent for rehearing, and date of filing.
16. Suggestions of appellant and respondent on the above motion, together with dates of filing.
17. The overruling of the motion, together with the date thereof.
18. Motion to stay the mandate, and date of filing thereof.
19. Order staying the mandate.
20. This praecipe, with proof of service.
21. Certificate of the clerk.

Trusty & Pugh, Louis N. Wolf, Guy W. Green, by Guy W. Green, Attorneys for respondent, 735 Lathrop Building, Kansas City, Missouri.

Copy of the within praecipe received this 21st day of April, 1948. Patterson, Chastain, Cowherd & Smith.

[fol. 52] In the Supreme Court of Missouri—En Banc

[Title omitted]

Amended Praecipe for Transcript—Filed March 6, 1948

To the Clerk of the Supreme Court:

Please ignore the prior praecipe filed by the respondent herein and prepare a transcript of the record in the above cause in accordance with this amended praecipe to be sent to the Supreme Court of the United States in connection with respondent's application for writ of certiorari, including in said transcript the following:

1. Entry of institution of action on November 25, 1941.
2. Fourth amended petition for damages.
3. Answer to Fourth Amended Petition, together with date of filing.
4. Entry showing cause came on regularly for trial.
5. All instructions on behalf of appellant and respondent given by the court.

[fol. 53] 6. Verdict of the jury.
7. Judgment of the trial court.
8. Motion for new trial and date of filing thereof.

9. Order of court overruling motion for new trial.

10. Filing of the notice of appeal, together with copy thereof and date of filing.

11. Filing of appellant's transcript on appeal in this court.

12. Case assigned to Division Number One.

13. Case argued and submitted.

14. Record of reversal of the judgment and the date thereof.

15. Opinion of the court.

16. Motion of respondent for rehearing or in the alternative to transfer the case to the Court En Banc and date of filing.

17. Record of the overruling of said motion together with the date thereof.

18. Record of the transfer of said cause to the Court En Banc upon the court's own motion.

19. Case argued and submitted before a Court En Banc.

20. Record of reversal of the judgment by Court En Banc and the date thereof.

21. Motion of respondent for rehearing and date of filing.

22. Record of the overruling of the motion for rehearing in Court En Banc, together with the date thereof.

23. Motion to Stay the Mandate and date of filing thereof.

24. Order staying the mandate.

[fol. 54] 25. Original praecipe with proof of service.

26. Amended praecipe with proof of service.

27. Certificate of the Clerk.

Trusty & Pugh, Louis N. Wolf, Guy W. Green, Attorneys for Respondent.

Received copy of this amended praecipe this 4th day of May, 1948. L. J. Bishop, Attorneys for Appellant.

[fol. 55] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] IN THE SUPREME COURT OF MISSOURI EN BANC,
JANUARY SESSION, 1948

No. 39908

WILLIAM T. URIE, Respondent,

vs.

GUY A. THOMPSON, Trustee of the MISSOURI PACIFIC RAILROAD COMPANY, A Corporation, Appellant

PRAECIPE FOR ADDITIONAL TRANSCRIPT

To the Clerk of the Supreme Court:

In addition to the record called for by the amended praecipe heretofore filed, please prepare an additional transcript in the above entitled cause to be sent to the Supreme Court of the United States in connection with respondent's petition for writ of certiorari, the following:

Second amended petition as shown in the record filed in this cause on prior appeal bearing the same style as the present appeal and being designated Number 38629 on said prior appeal.

Louis N. Wolfe, Trusty & Pugh, Guy W. Green, Attorneys for Respondent.

Received copy of within praecipe this 5th day of June, 1948. Patterson, Chastain, (Illegible) & Smith, by (Name illegible), Attorneys for Appellant.

[fol. 43] IN THE SUPREME COURT OF MISSOURI, DIVISION NO. 1, SEPTEMBER TERM, 1943.

No. 38629

WILLIAM T. URIE, Appellant,

vs.

GUY A. THOMPSON, Trustee of the MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Respondent

Appeal from the Circuit Court of Cass County, Missouri

Hon. Leslie A. Bruce, Judge

SECOND AMENDED PETITION FOR DAMAGES

Plaintiff states that defendant is now and for several years past has been the duly appointed, qualified and acting trustee of the Missouri Pacific Railroad Company; that said railroad and said trustee are engaged in Interstate Commerce, and said railroad is an interstate railroad; that at the times herein mentioned the plaintiff and defendant were both engaged in interstate commerce in the operation of interstate trains and cars and engines.

Plaintiff further states that prior to March 31st, 1933, the railroad was operated by the Missouri Pacific Railroad Company and that plaintiff worked for said company as a fireman on locomotives; that on said date said railroad went into Bankruptcy under Section 77 of the Federal Bankruptcy Act; that Guy A. Thompson and L. W. Baldwin were appointed trustees for said railroad and that Mr. Baldwin subsequently resigned and that Mr. Thompson is the sole trustee; that said railroad has been operated since March 31st, 1933, by said trustees until Mr. Baldwin resigned and since then has been operated by Mr. Thompson and that plaintiff has worked as an engineer and fireman as herein set forth.

[fol. 44] Plaintiff further states that he had worked for said road and said trustee for a period of about thirty (30) years, during which time he ran principally between Joplin and Kansas City on defendant's interstate trains, and that at the time he became unable to work he was about fifty (50)

years of age; that he first discovered the injury and physical condition in May, 1940.

Plaintiff further states that through the carelessness and negligence of the defendant he became afflicted with bilateral silicosis, and that as a direct result thereof has been totally incapacitated from carrying on his duties for the railroad since May, 1940; that said conditions were a direct result of the negligence of defendants as follows:

(1) Defendant failed to keep the locomotive and appurtenance thereof upon which plaintiff was required to work in a proper and safe condition to operate in the services to which they were put without unnecessary peril to life and limb in that the defendant used in the sanding devices used on said locomotives to put sand on the rails a sand material containing a very high percentage or quantity of silica or silican dioxide, to-wit, ranging about 80 to 90 per cent and often said sanders were so that when they were set in operation to put sand under the wheels and to stop or slacken the speed or to enable said engines to pull sufficiently, excessive and unnecessary quantities of such material would frequently come from the sanding devices on to the rails and such material when used would be ground to dust by the wheels and brakes of said locomotives and dust containing such usual and unusual quantity of silican dioxide would come from such use and into the locomotives where plaintiff worked and frequently of unusual quantity and such quantity would be breathed by him and defendant knew, or by the exercise of due care should have known, that such sand material so used contained such very high percentage of silica or silican dioxide and that the dust would form and frequently of excessive quantity because [fol. 45] of said sanders, and come into the cab and be breathed and that over a period of time such breathing of such dust was dangerous to the health and life and would likely cause to the plaintiff the condition resulting to the plaintiff.

(2) Defendant negligently failed to furnish plaintiff a reasonably safe place in which to work in that the locomotives on which plaintiff was required to work as fireman were supplied with sand for the sanders thereof which contained a very high percentage of silica or silican dioxide as

above, and defendant knew such fact and still defendant used same and used said engines under the conditions above described.

(3) Although the defendant was using sandy substance containing such quantity of silica, and using said locomotives that would cause and allow large quantities of silica dust containing silica to be created and come into the cab and be inhaled, yet defendant negligently failed to warn the plaintiff and negligently failed to furnish him with a respirator or device to prevent the inhalation of said silica dust.

Plaintiff further alleges that the sanding devices on said engines were all of the usual and customary type and used for the usual and cutomary purpose and if ordinary care was exercised in keeping them adjusted such large quantities of such sandy silica material would not escape; that plaintiff does not know whether the same kind of sand containing such high quality of silica was used by other railroads operating over or through such parts of the country of Missouri; that such sanding devices operated in the same manner by the same means as devices on locomotives of other railroads, and if kept in normal and regular working condition would not allow such large quantities of silica dust to form as above stated.

Plaintiff further states that the negligent acts and omissions of said defendant operated severally or concurrently [fol. 46] in causing him to become injured and afflicted with such bilateral silicosis and caused his health and strength to be weakened and impaired, and to render him physically unable to carry on his work, and that he is permanently injured and his earning power is destroyed, all to his damage in the sum of Thirty Thousand ($30,000) Dollars, for which amount with costs he prays judgment against defendant.

William Anderson, Trusty & Pugh, Attorneys for Plaintiff.

STATE OF MISSOURI,
County of Cole, Set:

I, Marion Spicer, Clerk of the Supreme Court of Missouri, hereby certify the foregoing is a full, true and correct transcript of the second amended petition in the cause of William T. Urie, appellant, vs. Guy A. Thompson, Trustee,

respondent, No. 38629, as called for in Respondent's praecipe for additional transcript, as fully as the same appears on file in my office.

Witness my hand and the seal of the Supreme Court of the State of Missouri at my office in the City of Jefferson City, State aforesaid, this 7th day of June, 1948.

Marion Spicer, Clerk of the Supreme Court of Missouri. (Seal.)

[fol. 47] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 129

WILLIAM T. URIE, PETITIONER,

VS.

GUY A. THOMPSON, TRUSTEE OF THE MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI EN BANC.

LOUIS N. WOLF,
Joplin National Bank Building,
Joplin, Missouri,
Attorney for Petitioner.

SAMUEL L. TRUSTY,
GUY W. GREEN,
735 Lathrop Building,
Kansas City, Missouri,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

WILLIAM T. URIE, PETITIONER,

VS.

GUY A. THOMPSON, TRUSTEE OF THE MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI EN BANC.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, William T. Urie, respectfully petitions for a Writ of Certiorari to review the final judgment and decision of the Supreme Court of Missouri *en banc*, the highest court of the State, reversing a judgment for Thirty Thousand Dollars ($30,000) in favor of petitioner and against Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a corporation, in an action brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*), 53 Stat. 1404 and the Boiler Inspection Act (45 U. S. C. A., Sec. 23), 43 Stat. 659.

OPINIONS BELOW.

The opinion of the Supreme Court of Missouri *en banc* is reported in *Urie* v. *Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a corporation*, 210 S. W. 2d 98 (not yet officially reported). Copy of Opinion (R. 20 *et seq.*). The opinion of the Missouri Supreme Court on the first appeal is reported in 352 Mo. 211, 176 S. W. 2d 471.

JURISDICTION.

This action arose and was determined under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*) and Federal Boiler Inspection Act (45 U. S. C. A., Sec. 23, *et seq.*) for damages for silicosis contracted while serving as a fireman in passenger service. The Missouri Supreme Court held that petitioner had no right of action under the Federal Acts relied on for recovery. The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code as amended by the act of February 13, 1925 (Title 28, U. S. C. A. 334 (a), 334 (b)). The judgment of the Supreme Court of Missouri *en banc*, the highest court in the State of Missouri, was entered on the 8th day of March, 1948 (R. 34), and petitioner's motion for rehearing was denied by that court on April 12, 1948 (R. 38), making the judgment final. Cases believed to sustain jurisdiction are:

Lilly v. *Grand Trunk R. R. Co.*, 317 U. S. 481, 87 L. Ed. 411.

Tiller v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 89 L. Ed. 465.

Ellis v. *U. P. R. Co.*, 329 U. S. 649, 91 L. Ed. 572.

STATUTES INVOLVED.

The pertinent provisions of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*) and the Federal Boiler Inspection Act (45 U. S. C. A., Secs. 23 and 32) are set forth in the appendix.

QUESTIONS PRESENTED.

The petition alleged and the evidence showed that over a period of seven years up to May, 1940, petitioner worked as a fireman on passenger locomotives; that during this period, sand of a high silica content was used in sanders and as ballast (R. 2, 22, 23). Due to defective sanding devices and cab floors in the locomotives on which he worked, silica dust was caused to be drawn into the cabs and to be breathed by him, causing total disability from silicosis (2-4, 23-24).

We have for decision by this Court for the first time federal questions as follows:

1. Can an employee engaged in interstate commerce under the Federal Employers' Liability Act recover for injury caused by the gradual inhalation of harmful quantities of silica dust resulting from the violations by the carrier of the Federal Boiler Inspection Act in having the sanding appliances and decks of the cabs in an unsafe and defective condition over a period of years so as to cause harmful quantities of silica dust to be created and drawn up through the defects in the cabs and to be inhaled by the employee?

OR

Does the Boiler Inspection Act limit and restrict all rights of recovery of an interstate employee to

"accidental injury" and in the sense that the injury is "attended by force and violence"?

2. Is it actionable negligence for which a recovery may be had under the Federal Employers' Liability Act to use sand of a high and dangerous silica content in defective and out of order sanding equipment and on the roadbed when, because of the condition of the sanding equipment, unnecessary and excessive quantities of such sand escapes and is ground under the wheels causing excessive quantities to fog up and be drawn through large and unnecessary openings in the cab floors where engine men must inhale it in the course of their duties over a period of years causing silicosis,

OR

Isn't the railroad required in the exercise of reasonable care to anticipate that continued exposure to such silica dust will cause silicosis?

STATEMENT.

Petitioner brought this action in a Missouri state court under the provisions of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51 *et seq.*) for negligence and for violations of the Boiler Inspection Act (45 U. S. C. A., Sec. 23) resulting in silicosis (R. 1, 43-45). A demurrer to the second amended petition was sustained by the trial court and petitioner appealed to the Supreme Court of Missouri. That court held as to charges of common law negligence: "We do not think that it would be reasonable to hold, under the facts admitted by demurrer, that defendant should have anticipated plaintiff's injury, and we therefore rule that the petition does not state facts sufficient to constitute a cause of action for negligence under the Federal Employers' Liability Act." As

to a cause of action for violations of the Boiler Inspection Act, the court held: "measured by the demurrer one of the omissions was failure to adjust the sanding machines, and by the demurrer the result of such omission is plaintiff's silicosis. We think the facts stated in the petition are sufficient to support recovery for breach of the Boiler Inspection Act." The case was remanded to the trial court (*Urie* v. *Thompson*, 352 Mo. 211; 176 S. W. 2d 471).

Upon remand, petitioner amended his petition in conformity with the opinion to more specifically allege violations of the Boiler Inspection Act (R. 1-4) and the case was tried before a jury (R. 8).

The petition as amended alleged and petitioner's evidence showed the following facts:

Petitioner worked as a locomotive fireman in interstate commerce, firing passenger locomotives on a run between Joplin and Kansas City, Missouri (R. 2, 22). On these runs the sanding devices of the locomotives were filled with mine tailings or chat consisting of approximately 97 per cent silicon dioxide (R. 2, 22, 23). The same silica material was used to ballast the roadbed (R. 2, 22). The sanding apparatus and the cab floors of these locomotives were in bad order and defective (R. 3, 4, 24). Silica dust escaping from the defective sanding apparatus and from the roadbed were sucked up through the openings in the cab floors by the speed of the moving locomotives and into the cabs where plaintiff was required to work (R. 2, 24). As a result of breathing harmful quantities of this silica dust over a period of years, petitioner contracted silicosis, which totally and permanently disabled him from May, 1940 (R. 2, 23).

The trial court gave petitioner's instruction No. 1 (R. 8-10) and the respondent's Instruction R (R. 13-14). These instructions required the finding of a violation of both the Federal Employers' Liability Act and the Federal Boiler Inspection Act and over a period of seven years, and that this caused silicosis. The jury returned a verdict for petitioner for Thirty Thousand Dollars ($30,000) upon which judgment was entered (R. 14).

Upon appeal, Division One of the Missouri Supreme Court reversed the case outright (R. 30). The case was transferred to the Missouri Supreme Court *en banc* where it was resubmitted, the opinion of Division One was adopted and judgment for respondent was entered (R. 34).

BASES OF OPINION OF THE STATE COURT.

In passing upon the case and as a basis for its decision the Supreme Court of Missouri said: "Heretofore the case has been considered upon the question of the sufficiency of the petition * * *, it being held the petition stated facts sufficient to support recovery for a breach of the Boiler Inspection Act" (R. 21). After reviewing the pleadings, the Missouri Court said, "It is said by defendant that the petition does not state and the evidence does not support a claim under the Boiler Inspection Act" (R. 22). After detailing the evidence and considering the case of *Lilly* v. *Grand Trunk R. Co.*, the Missouri Court said, "in the former review this court ruled with the Lilly case that * * * it is unnecessary that there be alleged (or shown) a defect in construction or mechanical operation. It was said, 'the sanding device which is out of adjustment is an unsafe appliance, the very thing that the carrier, under the Boiler Inspection Act insures against'" (R. 25).

The court then sets out the nub of the present opinion as follows, "In the former review *this court did not treat with the contention that silicosis is not an evil at which the Act is aimed.* If none of the consequences which a statutory enactment was designed to guard against has resulted from its breach, such a breach does not constitute an actionable wrong, even though some other injurious consequence has resulted.

This brings us to a more particular examination of appellant-defendant's contention that the Boiler Inspection Act is designed to guard against 'accidental' injury, and that silicosis is not within the purview of the protection of the act". (Italics ours) (R. 25-26).

The court then stated: "There is a definite differentiation generally found in the adjudicated cases between accidental injury (accidental in the sense that the injury is attended by force or violence) and pneumoconiosis (including silicosis) * * *" (R. 27).

After considering Section 2 of the Boiler Inspection Act in the light of rules promulgated under it by the Interstate Commerce Commission, the history of the various safety appliance acts, Section 8 of the Boiler Inspection Act dealing with reports in case of accident from failure of a boiler and the preamble to the act, the court reached the following conclusion, "It seems to us the act (considering the language of the Act itself, its preamble, its history, and its ancillary regulations) is aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts. The judgment should be reversed" (R. 30).

The above resume of the opinion of the Missouri Court shows that it constituted nothing more than a reconsideration and reversal of its first opinion. The court did not question the sufficiency of the evidence to support the allegations of the petition. It was conceded that the peti-

tion pleaded and the evidence supported the jury's finding that there were violations of the Boiler Inspection Act in the use and maintenance of defective sanding devices and defective cab floors which caused plaintiff's silicosis. Notwithstanding this, it was held that the demurrer to the petition should have been sustained on the first appeal.

REASONS FOR GRANTING THE WRIT.

I.

This court has never had for decision an action for damages under the Federal Employers' Liability Act for negligence or for violations of the Boiler Inspection Act involving injuries other than "accidental injuries," and has therefore never directly passed upon the important question of whether there may be recovery in such an action for injuries not "attended by force and violence." The second opinion of the Supreme Court of Missouri recognized that the Interstate Commerce Commission, by virtue of the authority conferred by the Boiler Inspection Act, is empowered to and has enacted regulations aimed at protecting the health of enginemen, yet, it held that recovery for violations of the act is limited to "accidental injury" in the sense that the injury is "attended by force and violence" (R. 27-30). It recognized that recovery had been allowed for negligence under the Federal Employers' Liability Act resulting in silicosis but refused to apply such law where the injury occurred on a locomotive. This petition therefore raises substantial and important questions regarding the scope and extent of the protection afforded employees insofar as a recovery for injuries under the two acts is involved. The determination by the Missouri court is unquestionably contrary to the manner in which this court would have decided the case.

II.

The determination of the scope and effect of the Boiler Inspection Act by the Missouri Supreme Court is in direct conflict with controlling decisions of this court holding that the Boiler Inspection Act was *not* "intended solely to prevent accidental injury in the operation of trains," but "*was intended to occupy the field*" of protection of enginemen from all hazards. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 47 S. Ct. 207; *U. S. et al.* v. *B. & O. R. Co. et al.*, 293 U. S. 454, 55 S. Ct. 268; *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 87 L. Ed. 411.

III.

The opinion conflicts with decisions of this court holding that where any injury results to one for whose benefit a statute was enacted, from disregard of such statute the right to recover damages is implied. *Swinson* v. *Chicago, St. P., M. & O. Ry. Co.*, 294 U. S. 529, l. c. 531, 55 S. Ct. 517; *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57, l. c. 61, 54 S. Ct. 573, l. c. 574; *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, l. c. 214, 54 S. Ct. 402, l. c. 405; *Davis* v. *Wolfe*, 363 U. S. 239, 243, 44 S. Ct. 64, 66; *L. & N. R. R. Co. et al.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 456, 457; *T. & P. Ry. Co.* v. *Rigsby*, 241 U. S. 33, 36 S. Ct. 482, l. c. 484.

IV.

The Supreme Court of Missouri in construing the Boiler Inspection Act, has violated rules of statutory construction laid down by this court and other Federal courts in the following respects:

(a) In holding that the word "accident" as used in Section 8 modifies and limits the duty placed on the railroad by Section 2, to the requirement that locomotives be "safe" from "*accidental injury*," so that they may be employed without "peril to life or limb" from "*force and*

violence." *Napier* v. *Atlantic Coast Line R. Co. et al.*, 272 U. S. 605, 47 S. Ct. 207; *B. & O. R. Co.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169; *In re Claim of A. E. Clark*, 27 Opinions of Attorney General 346; *In re Claim of Willard E. Jewell*, Opin. of Solicitor, Dept. of Labor, Apr., 1915, p. 261.

(b) In holding that the plain words and meaning of the Boiler Inspection Act are limited and overcome by the history and preamble of the act. *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826; *Tex. & Pac. Ry. Co.* v. *Rigsby*, 241 U. S. 33, 36 S. Ct. 482, 484; *L. & N. R. Co. et al.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 456; *Davis* v. *Wolfe*, 363 U. S. 239, 44 S. Ct. 64; *Swinson* v. *C., St. P., M. & O. Ry. Co.*, 294 U. S. 529, 55 S. Ct. 517; *Gemsco, Inc.*, v. *Walling*, 324 U. S. 244, 89 L. Ed. 921, 933; *Brotherhood of R. R. Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519, 529, 91 L. Ed. 1646, 1652; *Brady* v. *Terminal R. Assn. of St. Louis*, 303 U. S. 10, 58 S. Ct. 426.

(c) In considering regulations passed by the Interstate Commerce Commission under the act as limiting the benefits given an injured employee under the act. *Napier* v. *Atl. Coast R. Co.*, 272 U. S. 605, 613, 47 S. Ct. 207, 210; *B. & O. R. Co.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169.

(d) In distinguishing between injuries for which a recovery may be had for "negligence" under the Federal Employers' Liability Act and injuries for which recovery may be had for violation of the Boiler Inspection Act, instead of construing said acts *in pari materia* whereby violations of the Boiler Inspection Act constitute "negligence" for which "damages" may be recovered by employees "suffering injuries" as a proximate result thereof. *Napier* v. *Atl. Coast R. Co.*, 272 U. S. 605, 613, 47 S. Ct. 207, 210; *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826; *Tex. & Pac. Ry. Co.* v. *Rigsby*, 241 U. S. 33, 36 S. Ct. 482, 484; *L. & N. R. Co. et al.* v. *Layton*, 243

U. S. 617, 37 S. Ct. 456; *Davis* v. *Wolfe*, 363 U. S. 239, 44 S. Ct. 64; *Swinson* v. *C., St. P., M. & O. Ry. Co.*, 294 U. S. 529, 55 S. Ct. 517; *Gemsco, Inc.*, v. *Walling*, 324 U. S. 244; 89 L. Ed. 921, 933; *Brotherhood of R. R. Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519, 529, 91 L. Ed. 1646, 1652; *Brady* v. *Terminal R. Assn. of St. Louis*, 303 U. S. 10, 58 S. Ct. 426.

B. & O. R. Co. v. *Branson*, (Md.) 98 Atl. 225, 229; *K. C. S. Ry. Co.* v. *Chandler*, (Tex. Civ. App.) 192 S. W. 2d 304, 310; *Jamison et al.* v. *Encarnacion*, 281 U. S. 635, 650, 50 S. Ct. 440, 442; *Rowsie* v. *Thomas F. Jackson*, 196 Atl. 617, l. c. 618; *Marsh* v. *Industrial Commission of Calif.*, 217 Calif. 338, 18 Pac. 2d 933, 936; *Wurst* v. *American Car & Foundry Co.*, (Mo. App.) 103 S. W. 2d 6, 16; *Sadowski* v. *Long Island R. Co.*, 292 N. Y. 448, 55 N. E. 2d 497; *Atl. Coast Lines* v. *Wheeler*, 147 Va. 1, 132 S. E. 517; *C., R. I. & P. Ry. Co.* v. *Cheek*, 105 Okla. 91, 231 Pac. 1078; *Shelton* v. *Thompson*, 148 F. 2d 1, 157 F. 2d 709.

V.

The opinion of the Supreme Court of Missouri on prior appeal is in conflict with state and federal decisions under the Federal Employers' Liability Act in holding that although respondent used sand of a high and dangerous silica content in defective and out of order sanding equipment, because of which, unnecessary and excessive quantities of sand escaped and was ground under the wheels and excessive quantities were drawn into the cab where petitioner inhaled it over a period of years causing silicosis, the petitioner could not recover. *McComb* v. *County Commissioners*, 91 U. S. 1, 23 L. Ed. 185; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99, 33 S. Ct. 78; *Creason* v. *Harding*, 344 Mo. 452, 126 S. W. 2d 1179, 1183, 1184; *Smith* v. *Smith*, (Mo. App.) 192 S. W. 2d 691, 697; *Sadowski* v. *L. I. R. Co.*,

292 N. Y. 448, 55 N. E. 2d 497; *Shelton* v. *Thompson*, 148 F. 2d 1; 157 F. 2d 709; *B. & O. R. Co.* v. *Branson*, 128 Md. 678, 98 Atl. 225; *C., R. I. & P. R. Co.* v. *Cheek*, 105 Okla. 91; *Lillie* v. *Thompson*, 92 L. Ed. Ad. Op. 115.

It is essential that the writ be granted in order to determine important questions involving the interpretation of the Federal Employers' Liability Act and the Federal Boiler Inspection Act as to the type and nature of injuries which may be the subject of recovery and important questions as to the scope of the administration of the Acts insofar as protection of employees from injuries other than those attended by force and violence is concerned.

PRAYER.

Wherefore, your petitioner prays that a writ of certiorari be issued out of this court, directed to the Supreme Court of Missouri, commanding said court to certify and send to this court a transcript of the record in the case entitled, "William T. Urie, respondent, vs. Guy A. Thompson, trustee of the Missouri Pacific Railroad Company, a corporation, appellant, number 39908," including also the proceedings in said Court, to the end that said cause may be reviewed and determined by this court and the judgment of the lower court reversed.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF CASE.

The facts with reference to the opinions below, jurisdiction of the court and the statutes involved have been sufficiently covered in the petition and will not be here repeated. The issues, the pleadings, and the evidence have likewise been discussed in the preceding petition so that they will not be repeated at this point.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Supreme Court of Missouri Erred:

1. In holding that the Boiler Inspection Act in requiring the locomotive to be "safe and suitable" and so as not to "expose to unnecessary peril" was intended to provide protection from accidental injury instead of protection from all hazards of employment in interstate commerce.

2. In holding that "accident" as used in Section 8 of the act limits and restricts the broad provisions of Section 2 of the act and the word "injury" in Section 1 of the Federal Employers' Liability Act to accidental injury.

3. In holding that the history and preamble of the act are to be used as aids to the construction of the unambiguous language of Section 2 of the act.

4. In holding that the scope of the act is limited by regulations of the Interstate Commerce Commission issued by virtue of Section 2 thereof.

5. In holding that even though an injury was suffered as a direct result of violations of the Boiler Inspection Act, there can be no recovery for the injury suffered.

6. In failing to construe the provisions of the Federal Employers' Liability Act *in pari materia* with the Boiler Inspection Act.

7. In failing to give effect to the unrestricted meaning of the word "injury" as used in the Federal Employers' Liability Act.

8. In denying recovery for negligence in maintaining and using the locomotives and their equipment, even though there is no statutory right given for violation of the Federal Boiler Inspection Act alone.

ARGUMENT.

I.

Section 2 of the Boiler Inspection Act Is Plain and Clear, Is to Be Liberally Construed and "Was Intended to Occupy the Field" of Protection from All Hazards Instead of Being "Intended Solely to Prevent Accidental Injury in the Operation of Trains."

The Boiler Inspection Act is divided into two separate and distinct parts. The first part of Section 2 places a general obligation upon interstate carriers not to use any locomotive unless, "said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb * * *." This is a general obligation resting upon railroad companies entirely distinct from any inspection that may ever occur. The second part of the act creates a system of inspections under the chief inspector and district inspectors and provides for rules, regulations and reports. Section 2 would be entirely operative if no other part of the Bill had been enacted. Its requirements are entirely separate and distinct from the rest of the act (Cong. Hearings, Cong. R. 1246, Part 1, p. 729, Jan. 10, 1911). *Napier* v. *Atl. Coast Line R. Co. et al.*, 272 U. S. 605, 47 S. Ct. 207.

This action involves the obligation placed upon the railroads by Section 2 of the act. Its language is clear, definite and certain. *B. & O. R. Co.* v. *Groeger*, 266 U. S. 521, 523-524, 45 S. Ct. 169, 170. "The act * * * is to be liberally construed in the light of its prime purpose, the protection of employees by *requiring the use of safe equip-*

ment" (Italics ours). *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 486, 87 L. Ed. 411, 415. There is no warrant in the language of the act for construing it so narrowly as to limit it to the requirement that a locomotive tender and its appurtenances be safe from "accidental injury" so that it may be employed without "unnecessary peril to life or limb" from "force and violence." As said in *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 87 L. Ed. 411, 416, "The act without limitation speaks of equipment 'in proper condition and safe to operate * * * without unnecessary peril to life or limb.'" Clearly the locomotives are not "safe to operate" and "without unnecessary peril to life or limb" within the requirements of the Act when sand of a high and dangerous silicia content is used in defective and out of order sanding equipment and used on the roadbed and because of such condition of the sanding equipment unnecessary and excessive quantities of such sand escape and are ground under the wheels and cause excessive quantities to fog up and because of large and unnecessary openings in the floors of the cabs such dust from such sanders and dust from the roadbed is drawn up through such holes into the cabs and where the fireman must inhale it while doing his work and over a period of years and it causes silicosis.

The Missouri court did not hold that the language of Section 2 was ambiguous; neither did it hold that continued exposure to silicia dust by reason of defective sanders and cabs did not render the locomotive and its appurtenances unsafe or was not an "unnecessary peril to life or limb." Yet it held that the act was not broad and inclusive enough to authorize recovery by an interstate employee for such violations. This holding directly conflicts with controlling decisions of this Court defining the scope of the act.

The Missouri Court misconstrued the case of *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 47 S. Ct. 207, and

its holding is in direct conflict therewith. That case required, "a determination of the scope and effect of the Federal Locomotive Boiler Inspection Act." The question was whether the act occupied the field of regulating locomotive equipment used in interstate commerce so as to preclude state legislation.

The court first set out Section 2 of the Boiler Inspection Act and said "Other sections confer upon inspectors and the Commission power to prescribe requirements and establish rules to secure compliance with the provisions of Section 2."

One of the state statutes in issue was a Georgia act requiring an automatic fire door. This court pointed out:

> "The automatic fire door conserves the health of the fireman by protecting him from exposure to extremes of heat and cold while performing his duties; conserves his eyesight by reducing the amount and extent of exposure to the glare of the fire * * *"

The Wisconsin regulation in question provided for cab curtains, the purpose of which was to protect engineers and firemen from exposure that "caused great discomfort and danger of serious illness."

This court said "each device was prescribed by the state primarily to protect the health and comfort of engineers and firemen."

In support of the claim that Congress had not occupied the entire field, the state's main argument was "that the Federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure." The question as put by this court was: "Did Congress intend that there might still be state regulation of locomotives, if the meas-

ure was directed primarily to the promotion of the health and comfort, and affected safety, if at all, only incidentally?" In determining the case the court said:

> "We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, *was intended to occupy the field*. The broad scope of authority conferred upon the Commission leads to that conclusion" (Italics ours).

While the case did not involve the question of a right of recovery for impairment of health, it did directly construe the scope and effect of the Boiler Inspection Act. The Interstate Commerce Commission could have exclusive authority under the act to prescribe new or additional devices only when they would protect the health and comfort of engineers and firemen against the danger existing to health and comfort without such changes, and because of the general and absolute duties placed upon the carriers by Section 2 of the act. Such regulations could only be validly promulgated upon a finding that they would remove the existing danger to health, or "unnecessary peril to life or limb." *U. S. et al. v. B. & O. R. Co. et al.*, 293 U. S. 454, 463, 464, 55 S. Ct. 268, 272.

The same finding is necessary in an action to recover damages for breach of the Boiler Inspection Act. If the act is broad enough to authorize the Commission to prescribe regulations to conserve the health of engineers and firemen on evidence that it will prevent, or remove the already existing, "unnecessary peril to life or limb," a recovery may be made by an employee for injury to his health from the condition which the Commission finds presents "unnecessary peril to life or limb." Under the opinion in Napier, a fireman gradually developing cataracts and loss of eyesight from continued exposure to the glare of the fire would surely be within the scope of protection afforded by the act. So would an engineman who

developed a cold and pneumonia from exposure to snow, wind and rain in an open cab.

In construing the Napier case the Missouri court said, "The reading of this case does disclose a tacit recognition of the validity of the State's argument that the Federal regulation endeavors solely to prevent accidental injury in the operation of trains" (R. 27). This is a definite misinterpretation of the language of this court. The opinion expressly overrules the State's argument. At most the opinion discloses a tacit recognition of the validity of the statement that the Commission had theretofore made no regulations directed primarily to the prevention of impairment of health from the causes sought to be removed by the states, but it did not rule that the act itself did not require such protection to health. It held that the contention by the states, "if true, is not of legal significance."

The opinion is also in direct conflict with the construction of the act given it by this court in *U. S. et al. v. B. & O. R. Co. et al.*, 293 U. S. 454, 55 S. Ct. 268. This involved the power of the Interstate Commerce Commission to make an order under the Boiler Inspection Act requiring railroads to equip certain steam locomotives with power operated reverse gear instead of the hand reverse gear in use on 31,597 locomotives in the United States. The railroads challenged the jurisdiction of the Commission on the grounds that the procedure was unauthorized and that "a power reverse gear was not a safety device or appliance within the meaning of Section 2 of the Boiler Inspection Act."

In overruling this condition, the court said, l. c. 458:

> "First, the Commission clearly has authority, in an appropriate proceeding, to forbid the use of a locomotive *equipped* with a *manually operated* reverse gear, if, by reason thereof, the engine is *rendered unsafe or subjects employees of the railroad or others to*

unnecessary peril to life or limb. The substitution of power operated reverse gear for manually operated reverse gear might conceivably be found necessary to promote safety, *even if it did so only indirectly by preventing the impairment of the health of engineers through excessive exertion or fatigue.* To require the installation of power operated reverse gears is, in its nature, within the scope of the authority delegated to the Commission, for the power delegated to the Commission by the Boiler Inspection Act as amended is a general one" (Italics ours).

If the substitution of a power operated reverse gear could be ordered by the Commission to protect the health of employees it would have such power because the manually operated reverse gear would impair the health of the engineer or it would render the locomotive unsafe, or subject employees to "unnecessary peril to life or limb" within the meaning of Section 2 of the act, and because an engineer who suffered a nervous breakdown through excessive exertion or fatigue from using the manually operated reverse gear would be within the intent, scope and protection of the act. If so, an engineer suffering such breakdown could maintain an action for a violation thereof, even though the Commission had not exercised its power to issue such regulation.

Could it be held in the face of the Napier and B. & O. cases that the act is not broad enough to authorize the Commission to make regulations aimed at preventing injury from silicosis by keeping sanders in order and dispensing with openings in the decks or floors of cabs? Obviously not!

The Commission may issue such regulations, if locomotives exposing enginemen to silica dust constitute an "unnecessary peril to life or limb." If they do, they violate the act. If the act is violated, a right to recover is implied. Point II, *infra*.

II.

Since Petitioner Was One of the Class the Act Was Passed to Protect, His Right to Recover Damages for Any Injury Resulting from Its Breach Is Implied in the Act.

In its prior opinion (*Urie* v. *Thompson*, 352 Mo. 211, 176 S. W. 2d 471), the Missouri Supreme Court held: "Plaintiff alleges that the omissions of defendant caused his silicosis. *Measured by the demurrer one of the omissions was failure to adjust the sanding machines, and by the demurrer the result of such omission is plaintiff's silicosis*" (Italics ours). In the present review, the Missouri Supreme Court did not overrule its prior holding that measured by demurrer to the petition and evidence, omissions under the Boiler Inspection Act resulted in Petitioner's silicosis. It held that Petitioner could not recover even though this were true.

On finding of a violation of the act and proximate cause, Petitioner's right to recover became fixed as a matter of law.

The so-called Boiler Inspection Act is one of the Safety Appliance Acts. A violation of such an Act proximately causing an injury gives a right of recovery. In *Swinson* v. *Chicago, St. P., M. & O. Ry. Co.*, 294 U. S. 529, l. c. 531, 55 S. Ct. 517, this Court held: "The Safety Appliance Act (45 U. S. C. A., Sec. 1, *et seq.*) has been liberally construed so as to give *a right* of recovery *for every injury* the proximate cause of which was a failure to comply with a requirement of the Act" (Italics ours).

In *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57, l. c. 61, 54 S. Ct. 573, l. c. 574, this Court in discussing the Federal Safety Appliance Acts said: "A violation of the Acts is a breach of duty owed to an employee, whether he is at the time engaged in interstate or intrastate commerce."

In *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, l. c. 214, 54 S. Ct. 402, l. c. 405, it was held: "The Federal Safety Appliance Acts prescribed duties and *injured employees are entitled to recover for injuries sustained through the breach of these duties*" (Italics ours).

To the same effect is *Davis* v. *Wolfe*, 363 U. S. 239, 243, 44 S. Ct. 64, 66; *L. & N. R. R. Co. et al.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 456, 457.

In *T. & P. Ry. Co.* v. *Rigsby*, 241 U. S. 33, 36 S. Ct. 482, l. c. 484, the Court said: "A disregard of the command of the statutes is a wrongful act, and *where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied*, according to a doctrine of the common law. * * *."

III.

The Word "Accident" in Section 8 of the Boiler Inspection Act Does Not Limit the Duty under Section 2 to Making Locomotives "Safe" from "Accidental Injury" So That They May Be Employed Without "Peril to Life or Limb" Solely from "Injury by Force and Violence."

The Missouri court did not hold that the language of Section 2 of the Boiler Inspection Act reasonably indicated an intention to confine the benefits of that section to accidental injury. The court, to draw this conclusion, looked to the language of Section 8 of the act (45 U. S. C. A., Sec. 32) requiring a written statement to be made "in the case of accidents resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons * * *." Since Section 2 would be entirely operative without Section 8, the latter section cannot limit or restrict

the benefits conferred on employees by Section 2. It will be noted that Section 8 only requires reports of serious accidents from a failure of a locomotive *boiler* or its appurtenances. If requires no report to be made unless there is (1) *an accident*, (2) it is *serious*, (3) it results from a *failure* (4) of a *boiler* and appurtenances. Section 2 places a duty on the railroad as to *the entire locomotive, tender and appurtenances*. Failure of a part is not essential to recovery. *Lilly, supra*. Neither is serious injury.

An almost identical situation is found *In re Claim of A. E. Clark*, 27 Op. At. Gen. 346 (Opinions of Solicitor General, Dept. of Labor, Apr., 1915). In that opinion, Attorney General Wickersham held that the word "injuries" in the first section of the Federal Employees' Compensation Act was not controlled and narrowed by use of the word "accident" in Sections 3 and 4. It was pointed out that the section conferring the right referred broadly to "injuries," while the word "accident" was only employed in section 3 relating to reports and section 4 relating to affidavits in case of death. He held that an injury which came on by slow and imperceptible degrees was covered by the act. A later case under that act is, *In re Claim of Willard E. Jewell*, July 28, 1913, Opinions of Solicitor, Dept. of Labor, Apr., 1915, p. 261. It was there pointed out that at the time of the enactment of the Federal Employees' Compensation Law in 1907, "it is fair to presume that Congress had in mind the fact that under the British Workmen's Compensation Act, occupational diseases were not included as the law was originally passed. This was due to the particular wording of the law, which required in order to recover that there be a 'personal injury by accident' * * *" and those having the preparation of the bill in charge, could not be presumed to have been ignorant of the fact that the term

"injured" was broad enough to cover all cases of incapacity arising in the course of employment.

The Federal Employers' Liability Act and the Boiler Inspection Act form one act for purposes of recovery by interstate employees. In using the words "suffering injury" and "injury" in the Federal Employers' Liability Act it must likewise be presumed that Congress knew the distinction between injuries by accident and injuries that come on by slow degrees. Had it intended to limit recovery to injuries by accident, it must be presumed Congress would have specifically so provided. Had it intended that the benefits of the Boiler Inspection Act were to be limited to injuries by accident, it must be presumed Congress would have amended the Federal Employers' Liability Act or the Boiler Inspection Act to so state.

IV.

The History and Preamble of the Boiler Inspection Act Are Not to Be Considered in Interpreting the Unambiguous Language of Section 2 of the Act.

Despite its finding that under the unambiguous language of the Boiler Inspection Act, omissions under that act as pleaded and shown by the evidence resulted in petitioner's injury, the Missouri Court considered its preamble and history to reach its conclusion that it was "aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts." In doing so the Court violated the cardinal rules of statutory construction laid down by this Court that the purpose of Statutes as shown by title and history *is immaterial except for the purpose of resolving doubts as to the meaning of words used in the act in case of ambiguity.*

In *Fairport, P. & E. R. Co. v. Meredith*, 292 U. S. 589, 54 S. Ct. 826, the plaintiff sought damages for personal injuries resulting from a collision at a railroad crossing between the automobile she was driving and a train operated by the railroad company. The complaint alleged a violation of the Safety Appliance Acts in failure to maintain an air connection between the engine and cars and to maintain and use the power brakes. The jury found that the statutory violations were proximate causes of the injury. The state appellate court affirmed the judgment. On certiorari to this court the railroad contended that the judgment should be reversed because the Safety Appliance Act was intended only for the protection of employees and travellers upon the railroads. In passing thereon this Court said:

> "Very likely, the primary purpose in the mind of Congress was to protect employees and passengers. So much is indicated by the title—'An act to promote the safety of employees and travelers upon railroads,' etc. And this is borne out by the history of the legislation. * * * But we are asked to hold that the title expresses the sole intent of the act, and this involves a question of statutory construction. *The title of an act and the history leading up to its adoption, as aids to statutory construction, are to be resorted to only for the purpose of resolving doubts as to the meaning of the words used in the act in case of ambiguity*" (Italics ours).

In *Tex. & P. Ry. Co. v. Rigsby*, 241 U. S. 33, 36 S. Ct. 482, 484, *Supra*, this court determined that an intrastate employee could recover under the Safety Appliance Act even though it was specifically enacted for the benefit of employees engaged in interstate commerce. In *L. & N. Rd. Co. v. Layton*, 243 U. S. 617, 37 S. Ct. 456, it was held that while the purpose of passing the law requiring auto-

matic couplers was to protect those obliged to go between the cars to couple and uncouple them, the act did not by express terms confine its protection to employees when so engaged and that therefore any employee injured as a proximate result of a failure to comply with the act could recover. In *Davis* v. *Wolfe*, 363 U. S. 239, 44 S. Ct. 64, this Court announced the rule that regardless of whether an employee is engaged in an operation in which the safety appliances are specifically designed to furnish him with protection, he can recover if a failure to comply with the act is the proximate cause of the injury. In *Swinson* v. *C., St. P., M. & O. Ry. Co.*, 294 U. S. 529, 55 S. Ct. 517, this ruling was cited with approval.

In *Gemsco, Inc.*, v. *Walling*, 324 U. S. 244, 260, 89 L. Ed. 921, 933, this court said:

> "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

In *Brotherhood of Railroad Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519, 529, 91 L. Ed. 1646, 1652, this court said:

> "Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain."

See also *Brady* v. *Terminal R. Ass'n of St. Louis*, 303 U. S. 10, 58 S. Ct. 426.

V.

Rules of the Interstate Commerce Commission Have No Bearing on the Construction of the Act.

The court cites various rules promulgated by the Interstate Commerce Commission and concludes, "from these rules it is apparent the Interstate Commerce Commission has looked to the safety of the employee as purposed by the Act from the standpoint of safety from accidental injury in the operation of trains." This has no bearing on a construction of the Act. As this court has said, "The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power." *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 613, 47 S. Ct. 207, 210, *supra*.

VI.

The Federal Employers' Liability Act and the Boiler Inspection Act Are in Pari Materia and Violation of the Latter Constitutes "Negligence" under the Former for Which an Interstate Employee "Suffering Injury" May Recover Damages.

After setting out the pleadings and facts in evidence sufficient to support a finding that petitioner's silicosis resulted from negligence as well as statutory omissions in the care and maintenance of the sanding apparatus and the floors of the cabs of the locomotives, while using mine tailings containing 97% free silicia in sanders and on roadbeds, the Supreme Court of Missouri declared that, "negligence is not the basis for liability under the Boiler Inspection Act" because it "imposes upon the carrier an absolute and continuing duty."

Taking the above as its guide, the court ruled further that the opinions of courts upholding recovery for silicosis, for negligence under the Federal Employers' Liability Act were inapplicable. One of the fallacies of such holding lies in considering the case as though the Federal Employers' Liability Act and the Federal Boiler Inspection Act provide separate and independent rights and remedies.

While the Federal Boiler Inspection Act imposes an absolute duty upon the employer, which supersedes its common law duty under the Federal Employers' Liability Act, it makes no provisions for the nature and incidents of the remedy. *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U. S. 57, 61, 62, 54 S. Ct. 573, 574, 575; *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, 54 S. Ct. 402, 406; *Tipton* v. *Atchison, T. & S. Fe Ry. Co.*, 298 U. S. 141, 146, *et seq.*, 56 S. Ct. 715; *Breisch* v. *Central R. of N. J.*, 312 U. S. 484, 85 L. Ed. 964.

When a railroad breaches a duty to an intrastate employee under a Federal Safety Appliance Act, the nature and incidents of the remedy are left to the law of the state where the cause of action arose and the Federal Act is *in pari materia* with the state law. Authorities, *supra*. Had petitioner been injured in intrastate commerce, his right to recovery would have been under the Workmen's Compensation Law of the State of Missouri for fixed compensation rather than "damages," the violation of the act would become immaterial and the nature and extent of the injury the determining factor (Chap. 29, Mo. R. S. A.). *Tipton* v. *A., T. & S. F. Ry. Co., Supra.* Since petitioner was engaged in interstate commerce, *his exclusive right of action is provided by the Federal Employers' Liability Act.* *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, 216, 54 S. Ct. 402, 406.

Under that act, an employee in interstate commerce, "suffering injury" becomes entitled to "damages" for "such injury, resulting in whole or in part" from "neg-

ligence" of the carrier or its agents. If the "injury" results in whole or in part from a violation of a Federal Safety Appliance Act, the Federal Employers' Liability Act draws to it the provisions of that act so that both are to be read *in pari materia* and become one act for purpose of construction and application.

By Section 2 of the Boiler Inspection Act, a carrier is "bound absolutely to furnish what before, under the common law, it was its duty to exercise ordinary care to provide." *B. & O. R. Co. v. Groeger*, 266 U. S. 521, 528, 45 S. Ct. 169, l. c. 172. A violation of this absolute duty becomes "negligence," sometimes called "negligence *per se*," within the meaning of the phrase, "any defect or insufficiency due to its *negligence* in cars, engines, appliances," etc., in the Federal Employers' Liability Act. *San Antonio & Aransas Pass Ry. Co. v. Wagner*, 241 U. S. 476, 36 S. Ct. 626, 630; *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, 210, 216, 54 S. Ct. 402, 404, 406; *Lilly v. Grand Trunk R. Co.*, 317 U. S. 480, 87 L. Ed. 411; *McCarthy v. Penn. R. Co.*, (C. C. A. 7) 156 F. 2d 877, 879-880. Since petitioner's exclusive right of action arise under the Federal Employers' Liability Act and the effect of the Boiler Inspection Act is to amend the Federal Employers' Liability Act so that a violation of an absolute duty imposed by the latter act becomes "negligence" within the meaning of the former act, petitioner's right of recovery for the particular injuries sustained must be governed by the former act. The question presented is not whether the Boiler Inspection Act provides a right of recovery for "injury due to the gradual inhalation of harmful dusts" but whether the Federal Employers' Liability Act provides a right of recovery to an interstate employee for such injury caused by the bad order condition of the cab floors and the sanding equipment.

If that question is answered in the affirmative, petitioner may recover since his injuries are proximately

caused by respondent's negligence (violations of the Boiler Inspection Act).

The words "suffer injury" and "injury" as used in the Federal Employers' Liability Act are unlimited and embrace any type of injury. *B. & O. R. Co.* v. *Branson*, (Md.) 98 Atl. 225, 229; *K. C. S. Ry. Co.* v. *Chandler*, (Tex. Civ. App.) 192 S. W. 2d 304, 310.

A liberal interpretation is to be given the Federal Employers' Liability Act because it was designed to enlarge and not restrict the rights of injured workmen. *Jamison et al.* v. *Encarnacion*, 281 U. S. 635, 650, 50 S. Ct. 440, 442.

Silicosis and pneumoconiosis are uniformly held to be injuries. *Rowsie* v. *Thomas F. Jackson*, 196 Atl. 617, l. c. 618; *Marsh* v. *Industrial Commission of Calif.*, 217 Calif. 338, 18 Pac. 2d 933, 936; *Wurst* v. *American Car & Foundry Co.*, (Mo. App.) 103 S. W. 2d 6, 16.

State and Federal Courts have uniformly permitted recovery under the Federal Employers' Liability Act for injuries other than those from "accidental injury" in the sense that the injury is "attended by force or violence." *Baltimore and O. R. Co.* v. *Branson*, 128 Md. 678, 98 Atl. 225 (Paint Poisoning); *Sadowski* v. *Long Island R. Co.*, 292 N. Y. 448, 55 N. E. 2d 497 (Silicosis); *Atl. Coast Lines* v. *Wheeler*, 147 Va. 1, 132 S. E. 517 (Lead Poisoning); *C., R. I. & P. Ry. Co.* v. *Cheek*, 105 Okla. 91, 231 Pac. 1078 (Creosote Poisoning); *Kansas City So. Ry. Co.* v. *Chandler*, (Tex. Civ. App.) 192 S. W. 2d 304 (repeated minor traumas); *Shelton* v. *Thompson*, 148 F. 2d 1, 157 F. 2d 709 (Carbon Monoxide Poisoning).

The Missouri court impliedly concedes that under the above cases silicosis is embraced within the word "injury" as used in the Federal Employers' Liability Act, but refuses to follow them because they involve common

law negligence rather than negligence *per se*, as a result of violation of a statutory duty.

VII.

The Petition on First Appeal and on the Present Appeal Stated and the Evidence Disclosed Facts Sufficient to Authorize a Recovery for Negligence under the Federal Employers' Liability Act.

On prior appeal the Supreme Court of Missouri considered the sufficiency of the allegations of plaintiff's petition to state a cause of action for negligence under the Federal Employers' Liability Act (*Urie* v. *Thompson*, 352 Mo. 211, 176 S. W. 2d 471). In passing on that question the Missouri Court said (l. c. 474, 475) "* * * For the purposes of the demurrer it stands admitted that plaintiff did so acquire silicosis." However, it held, "We do not think it would be reasonable to hold, under the facts admitted by the demurrer, *that defendant should have anticipated plaintiff's injury*, and we, therefore, rule that the petition does not state facts sufficient to constitute a cause of action for negligence under the Federal Employers' Liability Act" (Italics ours). The court then held that a cause of action for violation of the Boiler Inspection Act was stated and made the following order, "The judgment should be reversed and the cause remanded with direction to set aside the order sustaining the demurrer and dismissing the petition, and it is so ordered." Since that order did not constitute a final judgment, this is petitioner's first opportunity to raise the question in this court. *McComb* v. *County Commissioners*, 91 U. S. 1. 23 L. Ed. 185; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99, 33 S. Ct. 78.

Since petitioner had set out the basic facts bearing on negligence under the Federal Employers' Liability Act in his petition on first appeal, the ruling of the Supreme Court of Missouri on the question of recovery for negligence under the Federal Employers' Liability Act became the "law of the case" and petitioner and the trial court were bound by the opinion and in conformity to it, petitioner and the court were limited to submitting the case on violations of the Boiler Inspection Act. *Creason* v. *Harding*, 344 Mo. 452, 126 S. W. 2d 1179, 1183, 1184; *Smith* v. *Smith*, (Mo. App.) 192 S. W. 2d 691, 697.

Although petitioner did not have a right of review by this court on prior appeal, this court has not lost its jurisdiction to review the holding on that appeal. In *Louisiana Navigation Company* v. *Oyster Commission of Louisiana*, 226 U. S. 99, 33 S. Ct. 78, the precise question was involved. The trial court had sustained a demurrer to the petition. The Supreme Court of Louisiana on appeal held that the petition stated a cause of action as to certain lands, but no cause of action as to other land, and the case was remanded to the trial court. Plaintiff sued out a writ of error to this court and suggested that the right to review by this court would be lost as to that part of the cause of action which the Louisiana Supreme Court said was without merit if this court did not review the case because the opinion would become the law of the case and binding upon the Louisiana courts. In passing thereon this court said:

> "The rule which excludes the right to review questions arising in a cause depending in a state court until a final judgment is rendered by such court *involves as a necessary correlative the power and the duty of this court when a final judgment in form is rendered and the cause is brought here for review, to consider and pass upon all the Federal controversies in the cause*, irrespective of how far it may be that

by the state law such questions were concluded during the litigation, and before a final judgment susceptible of review here was rendered. *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 214, 53 L. Ed. 765, 768, 29 Sup. Ct. Rep. 430" (Italics ours).

The petition on first appeal specifically termed the acts alleged as "negligent."

On the trial from which this appeal arose, the pleadings, the facts in evidence as set out in the opinion and the findings required, particularly by Respondent's instruction R (R. 13-14) were sufficient to place in issue and support a finding that petitioner's silicosis resulted at least in part from respondent's negligence even though they are not specifically called "negligent."

The petition on prior appeal alleged that over a period of years the respondent used in the sanding devices on its locomotives a sand material containing a very high percentage of silica, and that the sanders were in such condition that when put in operation excessive and unnecessary quantities of sand would frequently come from the sanding devices on the rails and be ground to dust and "dust containing such usual and unusual quantities of silicon dioxide would come from such use and into the locomotives where plaintiff worked and frequently of unusual quantity and such quantity would be breathed by him * * * and that over a p[illegible] of time such breathing of such dust was dangerous [illegible] the health and life and would likely cause to plaintiff the condition resulting to plaintiff" (R. 44). The amended petition alleged additionally that the sanding devices were worn, out of adjustment, loose and broken and that the decks of the locomotives were old, worn, loose, bent, warped and contained open spaces, and that silica sand used on the roadbeds was also drawn into the cab (R. 2-4). The allegations and evidence that such conditions were permitted to exist over a period of years clearly constitutes such com-

mon law negligence as will authorize a recovery under the Federal Employers' Liability Act. Numerous State and Federal Court decisions which authorize recovery under the Federal Employers' Liability Act for exposure to poisonous and noxious substances have been set out under Point VII herein. In *Sadowski* v. *L. I. R. Co.*, 292 N. Y. 448, 55 N. E. 2d 497, recovery under the act was permitted for silicosis. In *Shelton* v. *Thompson*, 148 F. 2d 1; 157 F. 2d 709, recovery was permitted for carbon monoxide poisoning. In *B. & O. R. Co.* v. *Branson*, 128 Md. 678, 98 Atl. 225, recovery was allowed for paint poisoning. In *C., R. I. & P.* v. *Cheek*, 105 Okla. 91, creosote poisoning was made the basis for recovery and in *Shelton* v. *Thompson*, 148 F. 2d 1; 157 F. 2d 709, recovery was allowed for carbon monoxide poisoning.

The prior opinion in this case held that even though unusual quantities of silica dust was drawn into the cabs over a period of years causing silicosis this could not be made the basis of recovery "because it would not be reasonable to hold * * * that defendant should have anticipated plaintiff's injury." The last opinion in *Sadowski* v. *L. I. R. Co.*, *supra*, was not reported at that time. The present opinion would seem by inference to overrule the holding on the prior appeal as to common law negligence as well as the holding as to recovery for violations of the Boiler Inspection Act. It recognizes that recovery was authorized under the Sadowski case because "defendant should have taken precaution to prevent plaintiff from the consequences which might reasonably be anticipated from being required to work 'in more or less of a cloud of silica dust which enveloped him and which he necessarily inhaled'" (R. 28).

There is no less reason in the present case for holding that petitioner's condition might reasonably be anticipated from being required to work in an engine cab in silica dust which he necessarily inhaled. The court in the

present opinion, however, said the Sadowski case was not helpful in determining "whether a socalled occupational disease as distinguished from accidental injury is within the protection designed and could be afforded under the Boiler Inspection Act."

This court should take jurisdiction of this case to reconcile the first Missouri opinion with the conflicting opinions from other state and federal courts. Under the facts as alleged in both petitions, respondent should be charged with reasonably anticipating that petitioner might be injured from being required to inhale quantities of high content silica dust used by them in sanders and on the roadbed, and which was drawn into his working place through unnecessary openings where he was required to inhale it over a period of years.

The opinion in principle is in conflict with the recent opinion of this court in *Lillie v. Thompson*, 92 L. Ed. Ad. Op. 115, where it was held that a railroad which employed a young woman telegraph operator in a frame building, in an isolated part of its yards, might reasonably anticipate that she would be assaulted by third parties not employed by the railroad.

Wherefore petitioner respectfully submits that certiorari should be granted to the end that the opinion of the Supreme Court of Missouri on questions involving the construction and administration of the Federal Employers' Liability Act and Safety Appliance Acts be harmonized with the decisions of this court.

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APPENDIX.

The Federal Employers' Liability Act

The pertinent provisions of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*) are as follows:

Sec. 51. Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence: Definition of Employees

Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee: * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way, directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as entitled to the benefits of this chapter. Apr. 22, 1908, C. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

Sec. 53. CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES.

In any actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; PROVIDED, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66.

Sec. 56. ACTIONS; LIMITATION; CONCURRENT JURISDICTION OF COURTS; REMOVAL OF CASE IN STATE COURT

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

The pertinent provisions of the Federal Safety Appliance Act, usually known as the Boiler Inspection Act (45 U. S. C. A., Sec. 23 *et seq.*) are as follows:

Sec. 23. USE OF UNSAFE LOCOMOTIVES AND APPURTENANCES UNLAWFUL; INSPECTION AND TESTS

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and

unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c. 103, Sec. 2, 36 Stat. 913; Mar. 4, 1915, c. 169, Sec. 1, 38 Stat. 1192; June 7, 1924, c. 355, Sec. 2, 43 Stat. 659.

Sec. 32. REPORT BY CARRIER TO DIRECTOR AS TO ACCIDENT; PRESERVATION OF DISABLED PARTS; INVESTIGATION AND REPORT THEREUPON

In the case of accident resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the director of locomotive inspection. Whereupon the facts concerning such accident shall be investigated by the director of locomotive inspection or one of his assistants, or such inspector as the director of locomotive inspection may designate for that purpose. And where the locomotive is disabled to the extent that it cannot be run by its own steam, the part or parts affected by the said accident shall be preserved by said carrier intact, so far as possible, without hindrance or interference to traffic until after said inspection. The director of locomotive inspection or an assistant or the designated inspector making the investigation shall examine or cause to be examined thoroughly the boiler or part affected, making full and detailed report of the cause of the accident to the director of locomotive inspection. Feb. 17, 1911, c. 103, Sec. 8, 36 Stat. 916; Apr. 22, 1940, c. 124, Sec. 1, 54 Stat. 148.

Pertinent rules of the Interstate Commerce Commission.

101. The railroad company will be held responsible for the general design, construction, and maintenance of locomotives and tenders under its control.

116 (a) Cabs shall be securely attached or braced and maintained in a safe and suitable condition for service. Cab windows shall be so located and maintained that the enginemen may have a clear view of track and signals from their usual and proper positions in the cab.

120. Sanders.—Locomotives shall be equipped with proper sanding apparatus, which shall be maintained in safe and suitable condition for service, and tested before each trip. Sand pipes must be securely fastened in line with the rails.

Congressional debates on the Boiler Inspection Law. (Cong. R. Vol. 46, part 1, p. 729, January 10, 1911)

"Mr. Cummins: Mr. President, inasmuch as I happened to be the chairman of the subcommittee which reported the bill and am therefore quite familiar with that part of it. * * *

* * * There is a very marked difference between rendering a boiler in use unlawful, subject to prosecution before a grand jury, and the inspections which are provided for in Section 5. * * *

Mr. Cummins: The Senator from Idaho totally, I think, misconceives the operation of the statute. It consists of two parts. First, it declares that it shall be unlawful for any common carrier to use a boiler unless it be in a safe condition. That is a general obligation resting upon the railroad companies entirely distinct from any inspection that may ever occur.

The second part of the bill creates a system of inspection under the chief inspector and district in-

spectors and the rules and regulations which are provided for in Section 5 are those which relate to the inspection that shall be made by the railroad companies themselves of their boilers. This is simply a provision from which it is hoped there will follow greater care upon the part of the railroad companies in the inspection of their boilers, and that there will be some uniformity in the rules relating to those inspectors. But Section 2 would be entirely operative if no part of the bill which follows Section 2 were enacted"

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SUPREME COURT, U.S.

No. 129.

In the Supreme Court of the United States

October Term, 1948.

WILLIAM T. URIE, *Petitioner*,

vs.

GUY A. THOMPSON, Trustee of the Missouri Pacific Railroad Company, a Corporation, *Respondent*.

RESPONDENT'S BRIEF.

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In the Supreme Court of the United States

October Term, 1948.

No. 129.

WILLIAM T. URIE, *Petitioner*,

vs.

GUY A. THOMPSON, Trustee of the Missouri Pacific Railroad Company, a Corporation, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

The Supreme Court of Missouri, *en banc*, reversed a judgment for petitioner (R. 34) and adopted the divisional opinion (R. 20, et seq.) (*Urie* v. *Guy A. Thompson*, Tr., 240 S. W. (2d) 98). The action was under the Federal Employers' Liability Act, 45 U. S. C., Sec. 51, et seq., charging violations of the Boiler Inspection Act, 45 U. S. C., Sec. 23, et seq. (R. 20).

The fourth amended petition on which the cause was tried alleged that for about 30 years prior to May, 1940,

petitioner was employed by respondent railroad as a fireman in interstate commerce and that during all of said time respondent allowed dusts and sand in harmful quantities to enter the cabs and decks of locomotives where petitioner worked, resulting in petitioner becoming disabled on and after May, 1940, from silicosis. After quoting Sec. 2 of the Boiler Inspection Act (45 U. S. C., Sec. 23), the petitioner alleged that his injuries and conditions were caused by respondent's violation of said Act in that: (1) Dusts and sands entered said locomotive in harmful quantities, (2) Sanders would let out sand when set in operation and when defective or not properly adjusted, (3) Decks and connections permitted dusts and sand to enter cabs, (4) Respondent failed to maintain said cabs and decks in safe condition (R. 1-4).

Respondent entered a general denial and further alleged that the locomotives were regularly inspected by inspectors of the Interstate Commerce Commission and that all regulations of the Commission had been complied with, averred silicosis is not within the purview of the Boiler Inspection Act, and further interposed the plea of limitation of action (45 U. S. C., Sec. 56) (R. 4-8).

The evidence was not included in the record but the opinion of the Missouri Supreme Court reflects that petitioner commenced work for the respondent railroad in 1908 and left in May, 1940, being principally employed as a fireman on engines from Joplin to Kansas City, Missouri (R. 22). The sand used was tailings from the lead and zinc mines of Webb City and Carterville, Jasper County, Missouri (R. 22). When the sanders on a locomotive were used or when they leaked sand onto the rails under the drivers, the speed would suck it up into the cab after it was ground under the wheels. The dust would be sucked up through any openings in the deck of the cab (R. 24). The opinion discloses no evidence that other rail-

road companies used different or less harmful sand, took measures to make the decks of cabs airtight against dust or sand; or installed in their cabs fans, masks or respirators to avoid dust being breathed by enginemen. In fact, it appears from the record and a search of authorities that this is the first reported case of a fireman or engineer seeking recovery for silicosis.

The cause was submitted to the jury under instructions which told them that they were not to give any consideration to whether respondent was negligent or not negligent because the case was based on the Boiler Inspection Act and by reason thereof negligence was not involved and wholly immaterial (R. 10, Instruction No. 3). The jury, so instructed, returned a verdict for petitioner in the sum of $30,000.00 and judgment was entered thereon (R. 14).

The Missouri Supreme Court reversed, holding that the Boiler Inspection Act is aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts and, since petitioner's condition was not one the act was designed to guard against, he could not recover (R. 30).

Petitioner seeks a review of that decision and also of the opinion of the Missouri Supreme Court on prior appeal, holding that petitioner could not recover under the Federal Employers' Liability Act upon the facts alleged (*Urie* v. *Thompson*, Tr., 352 Mo. 211, 176 S. W. (2d) 471). Although the reported opinion on first appeal is cited in the record, neither the judgment or opinion in this appeal are included in the transcript of record.

A reference to the reported opinion indicates that the Missouri Supreme Court there held that the petition alleged that the sanders were of the usual and customary type and were not defective, but the trouble was maladjustment; that respondent was not to be held to a higher degree of care than the average in the railroad

business; and that it would not be reasonable to hold, under the facts admitted by demurrer, that respondent should have anticipated petitioner's injury; the Missouri Supreme Court ruling that the petition did not state facts sufficient to constitute a cause of action for negligence under the Federal Employers' Liability Act.

The action was first instituted November 25, 1941, and on this first appeal, the Missouri Supreme Court refused to rule that injuries from inhalations of dust prior to November 25, 1938, were barred under 45 U. S. C., Sec. 56. Respondent contends that this holding was not in accord with the applicable decisions of this Court.

Respondent further contends that the judgment in the first appeal cannot now be reviewed, but in any event that, except as to limitations, both appeals were decided correctly and in accord with the applicable decisions of this Court.

ARGUMENT.

Summary of Argument.

I. The Boiler Inspection Act is aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts, silicosis or occupational disease; and petitioner cannot recover for a violation thereof since his condition was not one the statute was designed to prevent.

II. The Boiler Inspection Act furnishes no intelligible standard of conduct as to the prevention of occupational disease or the inhalation of harmful dusts.

III. Proof of negligence is essential to a recovery under the Federal Employers' Liability Act for injury resulting in negligence in cars, engines and appliances and the Boiler Inspection Act cannot be invoked to dispense with proof of negligence unless the injury was one that the Act was designed to prevent.

IV. Negligence is essential to any recovery at common law for occupational disease and to any recovery under the Federal Employers' Liability Act and the unbending test of negligence as to methods, machinery and appliances is the ordinary usage of the business. Respondent cannot be held to have anticipated the novel possibility of petitioner contracting silicosis while working in the open cab of a moving engine.

V. The words "any person suffering injury" in the Federal Employers' Liability Act does not include occupational disease or, more specifically, injury due to the gradual inhalation of harmful dusts.

VI. Petitioner assumed the risk of silicosis from dust in engine cabs prior to the Amendment of August 11, 1939, to the Federal Employers' Liability Act (45 U. S. C., Sec. 54).

VII. Petitioner cannot maintain an action for injuries from dust inhaled before three years prior to instituting action on November 25, 1941 (45 U. S. C., Sec. 56).

VIII. Since the transcript of record does not contain the judgment or opinion of the Supreme Court of Missouri on first appeal, it cannot be affirmatively determined that a decision of a federal question was necessary to a determination of the cause or that the judgment was not final, so as to permit review on certiorari from the final judgment in the second appeal.

IX. Certiorari should be denied.

I.

The Boiler Inspection Act is aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts, silicosis or occupational disease; and petitioner cannot recover for a violation thereof since his condition was not one the statute was designed to prevent.

A.

Legislative History of Enactment.

The Boiler Inspection Act was enacted in 1911 primarily to prevent accidental injuries and death from boiler explosions. (Act of Feb. 17, 1911, Chap. 103, 36 Stat. 913-916—Appendix.) The discussion of the bill (S. 6702) in the House of Representatives is found in the Congressional Record, Vol. 46, Part 3, pages 2070-2074.

Some material portions of the record are quoted for convenience:

"Mr. Fitzgerald: It is believed the result of this legislation will be the lessening of railroad accidents?

Mr. Mann: It is the belief of all people concerned, both the railroads and the employees, that the passage of this bill will materially result in the lessening of boiler explosions. * * *

Mr. Martin of Colorado: Mr. Speaker, I merely wish to assure the members, as perhaps the only member of this House who is directly affiliated with the railway brotherhoods of the country, that this measure is agreed upon by and is satisfactory to them at this time and in its present form. * * * But they feel that this is the recognition and the establishment by Congress of a much-needed principle—to protect the lives and limbs of railway employees—and that is what they are chiefly concerned in with reference to the present measure. * * *

We require driver brakes to be placed upon locomotives; we require air brakes; we require uniform automatic couplings; and we have recently passed an act relative to the equipment and inspection of handholds, steps, ladders, and running boards; so that the locomotive boiler is practically the only part of the train which is not now subject to inspection. * * *

Mr. Robinson: * * * Its enactment will diminish the number of accidents occasioned by defective boilers and will give some greater degree of security to those engaged in the very hazardous business of operating railway locomotives. * * *

The many accidents occurring on railroads in the United States as compared with some foreign countries emphasizes the necessity of enacting this measure. It is of the highest importance that every practicable means be adopted for guaranteeing safety to operatives and to passengers. I have not the slightest doubt that the systematic inspection of boilers

on locomotives used in interstate commerce, sought to be established by this bill, will in a very short time reduce to a minimum accidents arising from defective boilers. * * *

(First five pages of report of committee on this bill. Hon. James R. Mann, Chairman, Committee on Interstate & Foreign Commerce.)

Mr. Bartlett of Georgia: Mr. Speaker, may I state that there are many inaccuracies and awkward expressions in the bill. * * * But we realize that this was important legislation—a step in the right direction—for the protection not only of the lives and limbs of the employees of the railroad, but of the property of the railroad and the property of the public, * * *.

Mr. Peters: * * * No form of accident in modern history is more terrible or more unnecessary than the boiler explosion. The demand for adequate inspection of boilers by the Government has resulted in this bill. * * * This bill assures the maintenance of a higher standard of safety in locomotive boilers and appurtenances than has heretofore been required. The requirements are absolute and unavoidable. * * * The bill also provides for the investigation and special report of all accidents due to faulty boilers. * * *"

As originally introduced the bill read in part as follows:

"SEC. 2. That from and after the first day of January, nineteen hundred and eleven, it shall be unlawful for any common carrier, * * * to use any locomotive engine * * * unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, * * * without unnecessary peril to life or limb.

Sec. 5 provided that rules should be filed with the chief inspector within three months after the approval of the

Act. Sec. 8 provided for the report and investigation of accidents resulting in serious injury or death. Sec. 2 was amended to read from and after July 1, 1911, without altering Sec. 5. In the Senate discussion of the bill, found at Congressional Record, Vol. 46, Part 1, pp. 728-731, Senator Heyburn of Idaho anticipated that this amendment would postpone the effective date of Sec. 2 until after the rules were required to be filed and the remainder of the Act as to inspection operative. Senator Cummins of Iowa, in charge of the bill, replied that the bill consisted of two parts: Section 2 creating a general obligation making it unlawful to use a boiler unless it be in safe condition, and the railroads were given until July 1st to prepare their equipment. A system of inspection as to which rules were then very largely in form and were to be filed within 3 months after approval of the Act.

Based upon the very hypothetical statement of Senator Cummins that Section 2 would be entirely operative if no part of the bill which follows Section 2 were enacted, petitioner argues that Section 8 cannot limit or restrict the benefits conferred on employees by Section 2. The Missouri Supreme Court did not so hold. But it did note Section 8 in arriving at its conclusion as to the purpose of the enactment. Certainly it is proper to consider the entire Act in the interpretation of one of the provisions thereof. *United States* v. *American Trucking Association*, 310 U. S. 534, 543-544, 60 S. Ct. 1059, 84 L. Ed. 1345; *Johnson* v. *Southern Pacific R. Co.*, 196 U. S. 1, 25 S. Ct. 158, 49 L. Ed. 363.

This would be true even though Section 2 and the remainder of the Boiler Inspection Act could be considered as separate contemporaneous enactments. *Southland Gasoline Company* v. *Bayley*, 319 U. S. 44, 47, 63 S. Ct. 917, 87 L. Ed. 1244.

But Section 2 cannot be isolated from the remainder of the Act and particularly from Section 8, which provides that in case of "accident" from any cause "resulting in injury or death" a statement must be made of the fact of such "accident."

Petitioner relies upon *In re Claim of A. E. Clark*, 27 Op. At. Gen. 346 (May 17, 1909), which involved the claim of a plate printer, suffering a sprained wrist, for leave with pay under Act of May 30, 1908 (Chap. 236, 35 Stat. 556), applicable under Section 1 to certain employees of the United States "injured in the course of such employment." Attorney General Wickersham held that not all "injuries" under the statute need be reported under Sections 3 and 4 as "accidents." But any possible application which this opinion might have is wholly nullified by the later opinion of *In re Claim of John Sheeran*, 28 Op. At. Gen. 254 (April 25, 1910). Sheeran, in the course of his employment, while removing ashes from a building furnace room, contracted a severe cold resulting in pneumonia. This was in no way due to negligence or misconduct on his part. In holding the case was not covered by the Act of May 30, 1908, Attorney General Wickersham stated:

> "There is nothing in the language of the act or its legislative history which justified the view that the statute was intended to cover disease contracted in the course of employment, although directly attributable to the conditions thereof. On the contrary it appears that the statute was intended to apply to injuries of an accidental nature resulting from employment in hazardous occupations—not to the effects of disease. . . .
>
> That opinion (27 Op. 346), however, was not intended to create the impression that the statute in question covered diseases contracted in the course of

employment. The language of the opinion is, perhaps, broader than it should be, in the light of the committee report on the bill above quoted, which indicates that only injuries of an accidental nature were in mind. As, however, the statute is remedial, it should be generously construed, and so construed it might well be held to include injuries of the character there referred to, although, strictly speaking, no definite accident had occurred which give rise to the injury. The word 'injury,' however, as used in the statute, is in no sense suggestive of disease, nor has it ordinarily any such signification."

This sound opinion strikes at the very heart of petitioner's case, for under it both a "person suffering injury" under the Federal Employers' Liability Act (45 U. S. C., Sec. 51), and a person injured by "accident" under the Boiler Inspection Act (45 U. S. C., Sec. 23, *et seq.*), could not include a person suffering "disease" as a result of and in the course of his employment. It likewise nullifies the opinion of *In re Claim of Willard E. Jewell*, July 28, 1913, Opinions of Solicitor, Dept. of Labor, Apr. 1915, p. 261, cited by petitioner.

The title of the Boiler Inspection Act is indicative of the purpose and intent of the Act (Chap. 103, 36 Stat. 913):

> "CHAP. 103—An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto."

The title was retained in the Act of March 4, 1915 (Chap. 169, 38 Stat. 1192), amending the Act to "include the entire locomotive and tender and all parts and appurtenances thereof," and in the Act of June 7, 1924 (Chap. 355,

43 Stat. 659-660), rewriting Section 2 to conform to the amendment. The Senate discussion of the Act of March 4, 1915, is found at Congressional Record, Vol. 52, Part 5; p. 5355, where Senator Robinson submitted Report No. 1068 on the bill (H.R. 17894) and stated:

> "Mr. Robinson: Mr. President, I can explain briefly the purpose of this bill. It proposes an amendment to the boiler-inspection law, which contemplates the inspection of the entire locomotive. I believe experience has shown the wisdom of the boiler-inspection law and that it is necessary, or at least advisable, that this bill should be passed."

The Missouri Supreme Court properly considered the title and legislative history of the Boiler Inspection Act to reach its conclusion that it was "aimed at promoting safety from accidental injury, as distinguished from injury due to the gradual inhalation of harmful dusts." *Harrison* v. *Northern Trust Company*, 317 U. S. 476, 479, 63 S. Ct. 361, 87 L. Ed. 407; *United States* v. *United Mine Workers of America*, 330 U. S. 258, 277-278, 67 S. Ct. 677, 91 L. Ed. 884.

B.

Section 2 of the Boiler Inspection Act is directed to the prevention of peril to life or limb and not to the prevention of sickness or disease.

Napier v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432, reversed 188 Wis. 232, 205 N. W. 932, holding invalid an order of the Railroad Commission of Wisconsin requiring automatic firebox doors and cab curtains. The Supreme Court of Wisconsin in a unanimous opinion, sustained the order as a health measure and not in conflict with the Boiler Inspection Act, a safety statute (l. c. 934):

> "But there is nothing in this act which even remotely suggests that the object and purpose of the federal legislation was to promote public health, or the health and comfort of employees, except in so far as that might incidentally result from the promotion of their safety."

This Court recognized the correctness of this statement but reversed on the ground that the Boiler Inspection Act, though a safety statute, was intended to occupy the entire field as to inspection and equipment of locomotives. The opinion of Brandeis, Jr., reads in part:

> "The argument mainly urged by the states, in support of the claim that Congress has not occupied the entire field, is that the federal and the state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. * * * We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the states are precluded, however commendable or however different their purpose."

In *Chicago & N. W. R. Co.* v. *Michigan P. U. Co.*, 233 Mich. 678, 208 N. W. 62, a divided Court affirmed a decision of the public utilities commission, under a state statue, to prescribe cab curtains for railroad locomotives used in interstate commerce, on the theory that state reg-

ulation prescribing the cab curtains was for the protection of the "health" of the employees, which term was not synonymous with the "safety" of employees as used in the Federal Boiler Inspection Act. The opinion of Sharpe, J., was in complete accord with the Wisconsin Supreme Court in the Napier case, *supra*, holding as to the Federal Boiler Inspection Act (1. c. 69):

> "I can see no intimation in it of an intent to protect the health of men employed in operating the locomotive. * * * While some of the provisions of the federal acts may tend to protect the health of the employees, such protection is but incidental to the main purpose, that of safeguarding the lives and limbs of the employees and protecting that which is being transported, be it passengers or freight."

The opinion of Steere, J., followed the line of reasoning of this Court in the Napier case, and the case was reversed and remanded per stipulation of counsel by memorandum opinion (273 U. S. 779, 47 S. Ct. 448, 71 L. Ed. 888).

It was noted in the Napier case that the Interstate Commerce Commission had not exercised its power to prescribe an automatic fire-box door and cab curtain. The power was exercised in *R. R. Comm. of Wis.* v. *Aberdeen & Rockfish R. Co.*, 142 I. C. C. 199, 203, ordering Rule 116 (g), May 7, 1928, as to cab curtains; and in *Pub. Utilities Comm. of Ohio* v. *Penn. R. Co.*, 151 I. C. C. 448, 467, as to mechanically operated fire-door. The findings in these cases indicate that while appliances may be required which incidentally prevent fatigue or promote comfort their basic purpose must be to insure "safety" and prevent "unnecessary peril to life or limb." If the appliance does not meet this test then it cannot be required by the Interstate Commerce Commission no matter

how much it might benefit the health of employees. Cab curtains protect the engineer and firemen from the discomfort and distraction of rain, snow and wind, thus promoting safety. Automatic fire-doors protect the fireman from excessive fatigue and thus promotes safety.

U. S. v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 55 S. Ct. 268, 79 L. Ed. 587, was an appeal from a decree setting aside an order of the Interstate Commerce Commission under the Boiler Inspection Act, entered January 5, 1933, requiring certain steam locomotives to be equipped with a power reverse gear (*Johnson* v. *Atlantic Coast Line R. Co.*, 190 I. C. C. 354). The lower court upheld the railroad's contention that the order was void for lack of certain essential findings of fact, and this Court affirmed (l. c. 270-272):

> "The substitution of power operated reverse gear for manually operated reverse gear might conceivably found necessary to promote safety, even if it did so only incidentally by preventing the impairment of the health of engineers through excessive exertion or fatigue * * *. The operation of an engine, however equipped, involves some 'danger to life or limb.' At common law the carriers were 'free to determine how their boilers should be kept in proper condition for use without unnecessary danger.' *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 529, 45 S. Ct. 169, 172. And the act conferred authority to prescribe by rule, specific devises, or changes in the equipment, only where these are required to remove 'unnecessary peril to life or limb.' The power to make the determination whether the proposed devise or change is so required, vests in the Commission. But its finding to that effect is essential to the existence of authority to promulgate the rule; and, as Congress has made affirmative orders of the Commission subject to judicial review, Chicago Junction

Case, 264 U. S. 258, 263-265, 44 S. Ct. 317, the order may be set aside unless it appears that the basic finding was made. *Florida* v. *United States*, 282 U. S. 194, 51 S. Ct. 119, 125."

The Interstate Commerce Commission then held another hearing and again entered the order. *Johnson* v. *Atlantic Coast Line R. Co.*, 222 I. C. C. 542. However, this time the Commission was diligent in making the required finding (l. c. 553, 565, 568):

"In the consideration of other cases in which the safety of train and locomotive operation was involved, it is clearly indicated that the lessening of fatigue with resulting interest and efficiency in the performance of duty promotes safety and prevents unnecessary peril to life or limb. * * * Our failure to establish a rule to provide for the removal of appliances which we find cause unnecessary peril to life or limb, and to substitute therefor appliances, which we find promote the safety of employees and travelers by rail would be an evasion of one of the important duties placed by statute upon us. * * * We find that the use on steam locomotives of manually operated reverse gear, as compared with power reverse gear, causes unnecessary peril to life or limb, and that the safety of employees and travelers on railroads requires that suitable power operated reverse gear shall be substituted for manually operated reverse gear."

Johnson v. *A. T. & S. F. Ry. Co.*, 225 I. C. C. 519, 551, as to mechanical stokers, is to the same effect as to the basic finding.

The decisions are reviewed in Annotation—Construction and Application of Federal Boiler Inspection Act, 80 L. Ed. 743, II Purpose and Scope of Act, pp. 744-752; and Vol. 2, Roberts, Federal Liabilities of Carriers (2nd Ed.), Sec. 501, pp. 1023-1026.

Petitioner cites language in the Napier case that: "The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power." This court was there dealing with the question of whether or not the Boiler Inspection Act so occupied the field as to exclude state legislation. Since the Napier case the Commission has exercised its authority and the decisions of this Court limiting that authority to equipment necessary to promote "safety" and to remove "unnecessary peril to life and limb conclusively demonstrate that the purpose of the act was to protect employees from accidental injury in the operation of trains. The Missouri Supreme Court properly considered the rules promulgated by the Interstate Commerce Commission in the exercise of its authority as reflecting the purpose of the Act. This is the antithesis of the attempt made in the Napier case to infer a construction of the Act from the failure to exercise authority granted thereunder.

C.

There is a definite differentiation between "accidental injury" and pneumoconiosis (incuding silicosis) attributable to the inhalation of harmful dusts over a period of time.

The Missouri Supreme Court held (R. 26-27):

> "There seems to be no expression reasonably indicatory of a purpose to require the engine and its appurtenances to be so constructed and maintained as to protect against injuries due to the presence of dusts in the cabs of locomotives. There is a definite differentiation generally in the adjudicated cases, between 'accidental injury' (accidental in the sense that the injury is attended by force or violence), and pneumoconiosis (including silicosis), which is evidenced by pathological changes in lung

structure attributable to the effects of the inhalation of harmful dusts over a period of time. Vol. 1, Words and Phrases, Accident, p. 250, particularly at page 289 *et seq.*; *Smith* v. *Harbison-Walker Refractories Co.*, 340 Mo. 389, 100 S. W. (2d) 909; *Bolosino* v. *Laclede-Christy Clay Products Co.* (Mo. App.), 124 S. W. (2d) 581; *Wurst* v. *American Car & Foundry Co.* (Mo. App.), 103 S. W. (2d) 6; *Billo* v. *Allegheny Steel Co.*, 328 Pa. 97, 195 Atl. 110. See also, Morris-Landis, Diseases of the Chest (6th Ed.), p. 568; *Mansfield* v. *Wagner Electric Mfg. Co.*, 294 Mo. 235, 242 S. W. 400."

The cases are legion to support this proposition. They cannot be here reviewed. However as indicating the fundamentals of this "differentiation" we cite:

Brodek v. *Indemnity Ins. Co. of N. Am.*, 292 Ill. App. 363, 11 N. E. (2d) 228, l. c. 236:

"Other cases in this state have consistently held that an occupational disease is not an accidental injury. In *Labanoski* v. *Hoyt Metal Co.*, 292 Ill. 218, 126 N. E. 548, 549 * * * the court said the words 'accidental injury or death' are used and are to be understood in their popular sense; that an occupational disease, such as lead poisoning, does not occur suddenly, but is a matter of slow development, and the Occupational Diseases Act was passed for the protection of employees from such diseases."

McIntyre v. *E. J. Lavino & Company, et al.*, 344 Pa. 163, 25 A. (2d) 163, states:

"Occupational diseases are, from a legal standpoint, peculiar in this—that they arise, not from an accident or event happening at a precise moment, but from a day to day exposure to unhealthful conditions over an extended period; the exact time of

their origin is necessarily obscure and their insidious progress is not revealed until, frequently after a long interval, the disability which they create manifests itself. In the case of accidents compensable under the Workmen's Compensation Act, 77 P. S. No. 1 *et seq.*, the accident and the damage resulting therefrom, the cause and the effect, are usually determinable immediately and they are practically simultaneous."

D.

Since silicosis is not a consequence the Boiler Inspection Act was designed to guard against, the petitioner cannot base a recovery on any violation of that Act.

The Missouri Supreme Court held (R. 25-26):

"If none of the consequences which a statutory enactment was designed to guard against his resulted from its breach, such a breach does not constitute an actionable wrong, even though some other injurious consequence has resulted. 38 Am. Jur., Negligence, Sec. 163, p. 834; Vol. II, Restatement of the Law of Torts, Sec. 286, p. 752, *et seq.*; 45 C. J., Negligence, Sec. 111, pp. 726-7."

The court correctly treated this statement as settled law in all jurisdictions, both state and federal. 38 Am. Jur., Negligence, Sec. 163, p. 834, states the rule in accurate language:

"An action for negligence based upon an alleged violation of a statute or ordinance cannot be maintained where it appears that the statute or ordinance was enacted or ordained for a purpose wholly different from that of preventing the injury of which complaint is made. To afford a right of action for injury from the violation of a statute or ordinance, the complainant's injury must have been such as the statute or ordinance was intended to prevent. If none

> of the consequences which the enactment was designed to guard against have resulted from its breach, such a breach does not constitute an actionable wrong, even though some other injurious consequence has resulted. It is not enough for a plaintiff to show that the defendant negligected a duty imposed by statute and that he would not have been injured if the duty had been performed. He must go further and show that his injury was caused by his exposure to a hazard from which it was the purpose of the statute to protect him."

Huckleberry v. *Missouri Pacific Railroad Company*, 324 Mo. 1025, 26 S. W. (2d) 980, was an action for the death of a minor child caused by the failure to observe an Interstate Commerce Commission regulation issued under 18 U. S. C., Sec. 383, *et seq.*, requiring the inflammable liquids (gasoline) spilled from tank cars should be covered with dry earth before an engine is used in the vicinity. Gasoline from derailed tank cars was ignited while deceased's companion, on invitation, was attempting to salvage some of the gasoline. The court reversed a judgment of nonsuit, but quoted with approval from 20 R. C. L., Sec. 33, pp. 38-40:

> "The principle comprehensively stated is that where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose protection or benefit it was imposed for any *injuries of the character which the statute or ordinance was designed to prevent*, and which were proximately produced by such neglect." (Emphasis ours.)

Mansfield v. *Wagner Electric Manufacturing Co.*, 294 Mo. 235, 242 S. W. 400, was an action for an eye injury

caused by particles from an emery wheel, based upon Laws, 1919, p. 443 (Mo. R. S. A., Sec. 10194), requiring every person using a wheel which generates dust to provide such wheel with a hood and blower to carry off the dust and prevent inhalation. The court affirmed judgment for appellant upon a directed verdict, citing the similar case of *Wing* v. *Smith*, 190 Ill. App. 275; reviewed *St. L. & S. F. R. Co.* v. *Conarty*, 238 U. S. 243, 35 S. Ct. 785, 59 L. Ed. 1290, and held that the purpose and design of the statute was to promote the health of employees and not to prevent injury from dust flying into the eyes of employees, so that a verdict for defendant-appellant was properly directed. The court regarded the Conarty case, as followed in *Lang* v. *New York Central R. Co.*, 255 U. S. 445, 41 S. Ct. 381, 65 L. Ed. 729, as the latest word of this Court, rather than *L. & N. R. Co.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931.

Illinois State Trust Company v. *Missouri Pacific R. Co.*, 319 Mo. 608, 5 S. W. (2d) 368, reversed a judgment for plaintiff-respondent under the Federal Safety Appliance Act where deceased was not engaged in a coupling movement but was engaged in inserting a lug on a defective coupler of a car at rest, when struck by other cars put in motion by an unknown cause, holding that the violation of the Safety Appliance Act was not the proximate cause of his death. The court rationalized the Conarty, Lang and Layton automatic coupler cases, as well as *Davis* v. *Wolfe*, 263 U. S. 239, 44 S. Ct. 64, 68 L. Ed. 284, on the doctrine of proximate cause.

Petitioner cites the Wolfe case, the Layton case, and *Swinson* v. *C., St. P., M. & O. Ry. Co.*, 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041, for the proposition that recovery can be grounded on a violation of the Safety Appliance Act (as to automatic couplers and grab irons) even though

employee was not engaged in an operation in which the safety appliances were specifically designed to furnish him protection so long as the violation of the Act was the proximate cause of the accident.

In the Wolfe case the employee conductor was standing on a car sill step and holding to the grab iron while the train moved slowly at a station. He signalled the fireman for a stop but the train moved forward with a violent jerk and the loose grab iron caused Wolfe to fall. It was urged that Section 4 of the Safety Appliance Act required grab irons to aid in coupling movements and not for aid to the transportation of employees, but this Court stated that it was not unusual for employees to hold the grab iron to signal orders as to train movements and held that the violation of the Act was the proximate cause.

In the Layton case an attempted coupling failed and the cars collided with a car on which respondent switchman was standing, throwing him to the track. This Court held that the automatic coupler provision of the Safety Appliance Act was not confined to the protection of employees only when actually engaged in making a coupling, and the violation was the proximate cause.

In the Swinson case a handhold or grab iron gave way when a brakeman had a foot on it while attempting to release a tightly set hand brake. The use was not unusual and a natural one, subjecting the handhold to no appreciable greater strain.

Clearly these cases on proximate cause are not in point. The purpose of the grab irons is to hold to, and the purpose of couplers is to hold cars together. If defective, an action may be maintained for accidental injuries proximately caused by the defect. But the purpose of sanders is to give more breaking power to stop the locomotive and train. The purpose of the rule as to unnecessary or

excessive openings and cab curtains is to protect the engineer and fireman from inclement weather and thus reduce the hazard of collision. If a collision resulted from a violation of either of these rules resulting in accidental injury then a recovery could be based on the violation.

Fairport, P. & E. R. Co., v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1446, holds that injuries sustained by an automobile occupant in a crossing collision as the result of defective power brakes is within the terms and intent of the Safety Appliance Act, thus recognizing the rule that recovery can be had only for an injury the statute was designed to prevent. The purpose of power brakes, like sanders, is to prevent collision.

II.

The Boiler Inspection Act furnishes no intelligible standard of conduct as to the prevention of occupational disease or the inhalation of harmful dusts.

The Boiler Inspection Act cannot be construed as requiring protecton from the gradual inhalation of harmful dusts or occupational disease. So construed, the Act would be invalid since it furnishes no intelligible standard of conduct for compliance. *Connally* v. *General Construction Co.*, 269 U. S. 385, 389, 391, 46 S. Ct. 126, 70 L. Ed. 322; *Vallat* v. *Radium Dial Co.*, 360 Ill. 407, 196 N. E. 485, 99 A. L. R. 607, and NOTE 613. State statutes have consistently fallen by the wayside when they attempted to furnish protection against occupational disease, without furnishing some intelligible standard of conduct for compliance by the employer.

Respondent realizes that this Court in *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed.

419, held that the Act prescribes a sufficiently definite and certain standard of duty in that it replaces the common law duty with an absolute duty to have the locomotive boiler in a safe condition to operate without unnecessary peril. But the Court recognized that it should be left to the railroad to determine whether or not new devices and appliances were to be used.

Devices and appliances of an experimental nature, not customarily used, are not within the absolute duty imposed by the Act. *Southern Ry. Co.* v. *Lunsford*, 297 U. S. 398, 402, 56 S. Ct. 504, 80 L. Ed. 740, states:

> "Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not. These have not been excluded from the usual rules relative to liability."

Devices and appliances for the protection of employees against harmful dusts or occupational disease are not, by custom, usage or rule, a part of a complete locomotive, and the Act furnishes no guide as to what devices are acceptable and what protection shall be given.

III.

Proof of negligence is essential to a recovery under the Federal Employers' Liability Act for injuries resulting in negligence in cars, engines and appliances and the Boiler Inspection Act cannot be invoked to dispense with proof of negligence unless the injury was one that the Act was designed to prevent.

Section 1 of the Federal Employers' Liability Act of 1908 (45 U. S. C., Sec. 51), gave a right of action to employees "'suffering injury' resulting in whole or in part

from carrier's "negligence, in its cars, engines, appliances" or other equipment. Section 4 withdraws the defense of assumption of risk where the "violation * * * of any statute enacted for the safety of employees contributed to the injury or death * * *," and the Amendment of 1939 further withdrew such defense where the injury or death resulted from negligence, but the Amendment was not retroactive. Section 3 withdrew the defense of contributory negligence where the "violation * * * of any statute enacted for the safety of employees contributed to the injury or death * * *," but where the injury or death resulted from negligence, "* * * the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: * * *."

When the Boiler Inspection Act was enacted in 1911, Section 2 was considered a "statute enacted for the safety of employees" within Sections 3 and 4 of the Federal Employers' Liability Act, abolishing the defenses of contributory negligence and assumption of risk as to actions based on a violation of such statutes.

Accordingly, petitioner brought his action under the Federal Employers' Liability Act but alleged as negligence *per se* the violation of an absolute duty imposed by the Boiler Inspection Act, thereby foreclosing respondent of the defense of assumption of risk as to acts or defects prior to August 11, 1939, and of diminution of damages for contributory negligence as to all acts and defects. In addition, petitioner, under this allegation, did not have to prove the elements of common law negligence, but was only required to prove a violation of the Act.

But the Boiler Inspection Act no more amended the Federal Employers' Liability Act than that Act had amended the prior Safety Appliance Acts. *A., T. & S. F. Ry. Co.* v. *Swearingen*, 239 U. S. 339, 36 S. Ct. 121, 60 L. Ed. 317. While neither the Boiler Inspection Act nor

the Safety Appliance Acts contain express language conferring a right of action for the death or injury of an employee, the right of action, even without the Federal Employers' Liability Act, has never been doubted. *Texas & P. Ry. Co.* v. *Rigsby*, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874; *Louisville & N. R. Co.* v *Layton*, 243 U. S. 617, 620, 37 S. Ct. 456, 61 L. Ed. 931.

Negligence under the Federal Employers' Liability Act remains common law negligence and this is true as to "negligence, in its cars, engines, appliances" or other equipment. *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062.

Hence, even though the two acts are said to be *in pari materia*, where a recovery is sought, based upon a violation of the Boiler Inspection Act, the injury suffered must be one within the purview of the Boiler Inspection Act and one it was designed to prevent. To hold otherwise and allow a recovery by any person "suffering injury" as that term is used in the Federal Employers' Liability Act would be to enlarge, by judicial construction, the class of injuries as to which Congress has withdrawn the defenses of contributory negligence and assumption of risk. No decision of this Court even intimates that could be done.

IV.

Negligence is essential to any recovery at common law for occupational disease and to any recovery under the Federal Employers' Liability Act, and the unbending test of negligence as to methods, machinery and appliances is the ordinary usage of the business. Respondent cannot be held to have anticipated the novel possibility of petitioner contracting silicosis while working in the open cab of a moving engine.

The better reasoned authority is to the effect that there is no common law right of recovery for a true occupational

disease such as silicosis. (Annotation—Liability at common law * * * for occupational disease contracted by employee, 105 A. L. R. 80.)

But even in those jurisdictions recognizing a common law right of recovery there must be proof of all the elements of negligence. *Wolf* v. *Mallinckrodt Chemical Works*, 336 Mo. 746, 81 S. W. (2d) 323, 327; *Jones* v. *Rinehart & Dennis Co., Inc.*, 113 W. Va. 414, 168 S. E. 482, 484;

The Federal Employers' Liability Act, standing alone, created no right of action that did not exist at common law. *Escandon* v. *Pan American Foreign Corporation* (C. C. A. 5), 88 F. (2d) 276. The elements of common law negligence govern except as Congress has written into the law different standards. *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062; *C. & O. R. Co.* v. *Kuhn*, 284 U. S. 44, 52 S. Ct. 45, 76 L. Ed. 157; *Yazoo & M. Valley R. Co.* v. *Mullins*, 249 U. S. 531, 39 S. Ct. 368, 63 L. Ed. 754; *Brady* v. *Southern R. Co*, 320 U. S. 476, 484, 64 S. Ct. 232, 88 L. Ed. 239;

This is a novel case. The opinion sought to be reviewed and the petitions on which the cause was based state no facts indicating that respondent knew or should have known that dust from the sand used in the sanders and being sucked up into the cabs of locomotives would cause silicosis. There is nothing to indicate that good custom and usage in the railroad business required precautions be taken against such a possibility. The Rules of the Interstate Commerce Commission contain no provisions for appliances or precautions to be taken to protect against silicosis.

The Court will take judicial notice of the general construction of locomotives, of the fact that it is not customary for railroads to provide enginemen with masks, respirators or other appliancees to protect against silicosis,

that all sand contains silica, and that this is a new and novel complaint so far as enginemen are concerned. *Chicago, M. & St. P. R. Co.* v. *Wisconsin*, 238 U. S. 491, 400, 35 S. Ct. 869, 59 L. Ed. 1423; *March* v. *Pitcairn* (Mo. App.), 125 S. W. (2d) 972.

There appears to be only one other reported case where recovery was sought for silicosis in an action under the Federal Employers' Liability Act: *Sadowski* v. *Long Island R. Co.*, 292 N. Y. 448, where an engine service man was required to work in an enclosed sand house while enveloped in a cloud of silica dust, his duties including the handling of sand destined for locomotive sand boxes. The court sustained a recovery, holding that it is common knowledge that it is injurious to the lungs to work in silica dust. However, working in an enclosed building in a cloud of silica dust is far different from working in the open cab of a moving engine where the only dust is that drawn up from the roadbed and sanders.

It is entirely clear that, absent proof of notice to respondent that silicosis might be contracted from such dust as entered the engine cabs, there could be no recovery. *Grammer* v. *Mid-Continent Petroleum Corp.* (C. C. A. 10), 71 F. (2d) 38, 40, cer. den. 293 U. S. 571; *Canfield* v. *Iowa Dairy Separator Co.* (Iowa), 154 N. W. 434.

The situation is analogous to the early cases of creosote poisoning. It was first held that no recovery could be had because the employer could not be charged with knowledge of the harmful effects of handling creosoted ties. *Pinkley* v. *C. & E. I. Ry. Co.*, 246 Ill. 370, 92 N. E. 896; *Pecos & N. T. Ry. Co.* v. *Collins* (Tex. Civ. App.), 173 S. W. 250, 256. However, as the harmful effects of creosote to internal body tissues became known the knowledge of the employer became a question for the jury. *Sweany* v. *Wabash Ry. Co.* (Mo. App.), 80 S. W. (2d) 216, 221.

Wommack v. *Orr*, 352 Mo. 113, 176 S. W. (2d) 477, is of particular significance. The petition charged common law negligence only in failing to provide a reasonably safe place to work and failure to warn. Wommack was employed by Orr most of the time from 1932 to July, 1940, in the hauling of lead and zinc ores in the Joplin mining district. Part of the time he worked in the cars into which the ore was unloaded from the trucks and he testified that the dust was extremely heavy in these cars. The court held that a demurrer to the evidence was properly sustained because there was no substantial evidence that those engaged in a business like or similar to that of defendant had established a standard of care to protect their employees from exposure to silicosis, and that defendant had failed to adopt such standard. The court said (l. c. 482):

> "From the record the inference is that defendant carried on the business of ore hauling in about the same manner as did all others in the mining districts concerned. * * * 'No one is held by the law to a higher degree of care than the average in the trade or business in which he is engaged. * * * A man, in conducting his business in the way that everybody else in a like business does, has measured up to the ordinary care of prudent men men engaged in the business.' *McClaren* v. *G. S. Robins & Co.*, 349 Mo. 653, 162 S. W. (2d) 856, l. c. 858, and cases there cited. See also, *Uric* v. *Thompson et al.*, Mo. Sup., 176 S. W. (2d) 471, handed down currently herewith."

This Court has announced a similar rule. *Southern P. Co.* v. *Seley*, 152 U. S. 145, 14 S. Ct. 530, 38 L. Ed. 391. The railroad is not required to furnish the latest, best and safest appliances. *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419.

The Missouri Supreme Court, on first appeal (*Urie* v. *Thompson*, 352 Mo. 211, 176 S. W. (2d) 471), correctly ruled that (l. c. 475):

> "We do not think that it would be reasonable to hold, under the facts admitted by the demurrer, that defendant should have anticipated plaintiff's injury, and we, therefore, rule that the petition does not state facts sufficient to constitute a cause of action for negligence under the Federal Employers' Liability Act."

V.

The words "any person suffering injury" in the Federal Employers' Liability Act does not include occupational disease or, more specifically, injury due to the gradual inhalation of harmful dusts.

The Act does not define the phrase "any person suffering injury." However, there is nothing in the language of the Act or its legislative history (Congressional Record, Vol. 42, pp. 4265, 4426-4438, 4526-4551, 4755) which justifies the view that the statute was intended to cover occupational disease. The words "any person suffering injury," as they are used in the Act, are in no sense suggestive of disease. As stated by Attorney General Wickersham in *In re Claim of John Sheeran*, 28 Op. At. Gen. 254, the word "injury" is in no sense suggestive of disease "nor has it ordinarily any such signification."

Most of the numerous decisious holding that the word "injury" either did, or did not, include occupational disease, arose under Workmen Compensation Acts or Occupational Disease Acts. Many of the early compensation acts were modeled after the British act which granted compensation only where there was a "personal injury by accident." It was uniformly held that where these words were used or where the Act plainly indicated that

it was to apply only to accidental injuries, compensation could not be recovered by an employee suffering an occupational disease. This resulted in most of the acts being amended to specifically include occupational disease or in the enactment of occupational disease acts.

For example petitioner cites *Marsh* v. *Industrial Commission of California*, 217 Cal. 338, 18 P. (2d) 933, 936, for the statement that silicosis and pneumoconosis are uniformly held to be injuries. That case was a proceeding under the California "Workmen's Compensation, Insurance and Safety Act of 1917" (Acts 1917, p. 831, 833), Sec. 3 (4) of which provided: "The term 'injury,' as used in this act, shall include any injury or disease arising out of the employment." *Wurst* v. *American Car & Foundry Co.* (Mo. App.), 103 S. W. (2d) 6, 16, cited by petitioner, involved the Missouri Occupational Disease Act of 1913 (Laws 1913, p. 402, Mo. R. S. A., Secs. 10211-10225).

However the early compensation acts of Connecticut, Ohio, Michigan and Massachusetts covered "injury" sustained in the course of employment without qualification. Public Acts of the State of Connecticut, January Session, 1913, Ch. 138, p. 106, consists of two parts: Part A—Employers' Liability, and Part B—Workmens' Compensation. Each part covered "* * * personal injury sustained by an employee arising out of and in the course of his employment * * *." The Connecticut Supreme Court in *Miller* v. *American Steel & Wire Co.*, 90 Conn. 349, 97 Atl. 345, held that an occupational disease was not within the terms of the act, following *Industrial Accident Commission* v. *Brown*, 92 Ohio 309, 110 N. E. 744, and *Adams* v. *Acme White Lead & Color Works*, 182 Mich. 157, 148 N. W. 485, both decided on similar statutes. The only contrary case was Hurle's case, 217 Mass. 223, 104 N. E. 336, where the court thought it significant that the legislature

did not follow the wording of the English act, "personal injury by accident." That argument could not apply here because the Federal Employers' Liability Act is not a compensation act.

Petitioner cites several cases where recovery was allowed under the Federal Employers' Liability Act and the injury was not "attended by force or violence." *Kansas City Southern Ry. Co.* v. *Chandler* (Tex. Civ. App.), 192 S. W. (2d) 304, which affirmed judgment for plaintiff switchman by in an action for injury to his feet caused by alighting on a path covered with irregular rock (l. c. 310).

> "* * * we can see no valid reason for denying appellee the right of recovery simply because the injury suffered by him was the result of repeated traumas instead of one injury."

An occupational disease is an entirely different matter.

Baltimore & O. R. Co. v. *Branson*, 128 Md. 678, 98 Atl. 225, affirmed judgment for plaintiff painter who was poisoned by inhaling the spray from a paint gun he used over a period of some 11 months. The court held that the demurrer to the declaration was properly overruled, the words "suffering injury" in the Federal Employers' Liability Act being broad enough to include the injury sued for. The court entered into no examination of authority but grounded its ruling on the proposition that the Act was to be liberally construed. This Court reversed because the employee was not engaged in interstate commerce, 242 U. S. 623, 37 S. Ct. 244, 61 L. Ed. 534, and so was not called upon to deliver an authoritative opinion on the matter.

In the other cases cited by petitioner involving silicosis, and lead, creosote and carbon monoxide poisoning, recovery was permitted without any discussion whatever

as to whether the harm suffered was an "injury" under the Act.

For a comparison with other Federal acts, see Federal Employees' Compensation Act, 5 U. S. C., Sec. 790, par. 8, providing: "The term 'injury' includes, in addition to injury by accident, any disease proximately caused by the employment"; and Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., Sec. 902(2), providing: "The term 'injury' means accidental injury or death * * * and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury * * *."

Certainly we are not to believe that Congress meant "injury" in the Federal Employers' Liability Act to include occupational disease as well as accidental injury, when it was found necessary to so carefully define the term in these other acts in order to bring occupational disease within their scope.

Nor does right and justice demand that the term "any person suffering injury" be given unlimited scope. By the original act of 1908, Congress abolished the fellow servant rule and substituted comparative negligence for the common law defense of contributory negligence. By the amendment of 1939 assumption of risk was abolished as a defense to negligence, as it had been originally withdrawn as to violation of safety statutes. It is not reasonable to believe that Congress would understand the acts to cover occupational disease and yet withdraw all defense and leave the amount of recovery to the conscience or sympathy of a jury. The employer frequently cannot guard against occupational disease and frequently is not aware that it is being contracted until the employee is incapacitated. For this reason it is generally covered only by compensation acts or special occupational disease acts.

To include occupational disease in the Federal Employers' Liability Act would be, in effect, to impose liability without a limit on the amount of recovery.

VI.

Petitioner assumed the risk of silicosis from dust in engine cabs prior to the Amendment of August 11, 1939, to the Federal Employers' Liability Act. (45 U. S. C., Sec. 54.)

Assumption of risk becomes material only if it should be held that no recovery can be based on the Boiler Inspection Act, but that action might be maintained under the Federal Employers' Liability Act. In that event there is no doubt that the defense of assumption of risk has always been available, prior to the amendment of 1939. *Great Northern Ry. Co.* v. *Leonidas*, 305 U. S. 1, 59 S. Ct. 51, 83 L. Ed. 3.

The amendment of 1939, abolishing assumption of risk, can be given no retroactive application. *Brady* v. *Southern Ry. Co.*, 222 N. C. 367, 23 S. E. (2d) 334, 340; *Game* v. *Atlantic Coast Line R. Co.*, 204 S. Car. 452, 30 S. E. (2d) 33, 34; *Christenson* v. *Union Pac. R. Co.*, 137 Neb. 538, 290 N. W. 246; *Wichita Falls & S. R. Co.* v. *Lindley* (Tex. Civ. App.), 143 S. W. (2d) 428, 431; *Tennessee Cent. Ry. Co.* v. *Shacklett*, 24 Tenn. A. 563, 147 S. W. (2d) 1054, 1057. These cases all construe the 1939 amendment, but they are based upon and follow *Winfrey* v. *Northern Pacific R. Co.*, 227 U. S. 296, 33 S. Ct. 273, 57 L. Ed. 518, which is conclusive on the proposition.

The determination as to whether or not petitioner assumed the risk of contracting silicosis must be made in the light of the facts as revealed by the opinion of the Missouri Supreme Court. There is nothing in that opinion to indicate that the danger of working in any dusts

in the engine cab was not as fully known and realized by the petitioner as it was by the respondent. It was an incident to the employment as to which respondent had no superior notice or knowledge. No complaint was made and no assurance was given that the situation would be remedied. If, as alleged, petitioner worked in the dust of engine cabs for thirty years then it was an incident of his employment and he was as fully cognizant of any danger involved as was respondent. Most of the harm must have been from dust inhaled prior to August 11, 1939, and damages since that time are not separately stated.

Under these facts he assumed the risk of silicosis and cannot recover under the Act. *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062; *Northwestern Pac. R. Co.* v. *Bobo*, 290 U. S. 499, 503, 54 S. Ct. 263, 78 L. Ed. 462; *Chesapeake & O. Ry. Co.* v. *Kuhn*, 284 U. S. 44, 46-47, 52 S. Ct. 45, 76 L. Ed. 157; *Delaware, L. & W. R. Co.* v. *Koske*, 279 U. S. 7, 10-11, 49 S. Ct. 202, 73 L. Ed. 578.

VII.

Petitioner cannot maintain an action for injuries from dust inhaled before three years prior to instituting action on November 25, 1941. (45 U. S. C., Sec. 56.)

The limitation provision of Section 6 of the Federal Employers' Liability Act (45 U. S. C., Sec. 56) is one of substantive right, setting a limit to the existence of the obligation which the Act created. *Engel* v. *Davenport*, 271 U. S. 33, 38, 46 S. Ct. 410, 70 L. Ed. 813; *Atlantic Coast Line R. Co.* v. *Burnette*, 239 U. S. 199, 201, 36 S. Ct. 75, 60 L. Ed. 226; *Flynn* v. *N. Y., N. H. & H. R. Co.*, 283 U. S. 53, 51 S. Ct. 357, 75 L. Ed. 837.

Reading Co. v. *Koons*, 271 U. S. 58, 63-64, 46 S. Ct. 405, 70 L. Ed. 835 holds that a cause of action for death "accrued" under 45 U. S. C., Sec. 56, when the injury occurred and not at the time of death or the appointment of an administrator. This is true even though there be a justified delay in the appointment of an administrator. It was held that in both actions for death and for injury, the cause "accrues" "when the events have occurred which determine that the carrier is liable." The event on which liability is based is the inhalation of harmful dust. That event occurred each time a breath of dust was inhaled and the action then accrued. Petitioner could then have instituted his action and he could certainly have shown damage, past and prospective, on November 25, 1938. If he did not then realize that he had suffered "injury" that fact is without legal significance. The limitation provision is a part of the Act creating the right and is therefore a limitation of the right, rather than the remedy. It is founded upon public policy.

Damiano v. *Pennsylvania R. Co.* (C. C. A. 3), 161 F. (2d) 534, holds that 45 U. S. C., Sec. 56, cannot be tolled by fraud or concealment which prevented the institution of an action.

The Missouri Supreme Court, on first appeal (352 Mo. 211, 176 S. W. (2d) 471), held that the cause of action accrued in May, 1940, when petitioner became incapacitated, and was not barred, citing: *Associated Indemnity Corp.* v. *State Industrial Accident Comm.*, 124 Cal. App. 378, 12 P. (2d) 1075, and *Marsh* v. *Industrial Accident Comm.*, 217 Cal. 338, 18 P. (2d) 933, both holding that, for the purpose of "compensation" injury dates from the time that a diseased condition results in the incapacity to work. *Madison* v. *Wedron Silica Co.*, 352 Ill. 60, 184 N. E.

901, which was an action under an Occupational Disease Act providing that disablement should be treated as the accidental injury and making applicable the provisions of the state compensation act. *Palzak* v. *Allegheny Steel Co.*, 324 Pa. 422, 188 Atl. 130, which was an action under an act for the prevention of harm from dusts under which the cause accrued from the "time when the injury done."

It is submitted that these decisions do not support the holding of the court that the cause accrued when petitioner became incapacitated. It is the purpose of compensation acts to grant employees compensation only when they are unable to work. The amount and duration of compensation is dependent upon the inability to work. Occupational disease acts are generally only supplemental to compensation acts and both, quite generally, provide that in case of occupational disease no action can be instituted until the employee is disabled and the right then accrues.

The court in *Sadowski* v. *Long Island R. Co.*, 292 N. Y. 448, 55 N. E. (2d) 497, fell into the same error as did the Missouri Supreme Court, when it held that because of a continuing duty the entire cause accrued only when disability occurred.

We must look to actions for common law negligence to find the correct answer as to when the cause of action accrued. In such cases the overwhelming weight of authority is that the cause of action accrues when the forces which cause the injury are put in motion and that, in the case of silicosis, a cause of action sounding in negligence accrues when, through lack of care of the employer, the harmful dust enters the lungs of the employee. Later injurious developments are merely elements of damage in the first cause of action, even though the development of consequential damages may be long delayed and even

though the employee does not know of his injury. *Schmidt v. Merchants Despatch Trans. Co.*, 270 N. Y. 287, 200 N. E. 824; *Brown v. Tennessee Con. Coal Co.*, 49 Tenn. App. 123, 83 S. W. (2d) 568, 576-577; *Barksdale v. Silica Products Co.*, 200 Ark. 32, 137 S. W. (2d) 901, 902; *Scott v. Rinehard & Dennis Co.*, 116 W. Va. 319, 180 S. E. 276; *Street v. Consumers Mining Corp.*, 185 Va. 561, 38 S. E. (2d) 271, 272-273. Only a few of the many silicosis cases have been cited.

In *Moore v. A., T. & S. F. R. Co.*, 187 Okla. 534, 104 P. (2d) 236, the plaintiff sustained injury on January 24, 1937, which did not result in appreciable disability until approximately two years thereafter. He filed suit on October 26, 1939, and the court, citing *Reading Co. v. Koons, supra*, held that the cause of action accrued when the accident occurred, and the cause was barred under 45 U. S. C., Sec. 56. In *Cox v. M., K. & T. R. Co.*, 335 Mo. 1226, 76 S. W. (2d) 411, the plaintiff, on September 1, 1925, was struck a slight blow on the left hand by a sledge hammer, but in the course of a year or so cancer developed. It was held that an action brought within two years of the time the cancer developed but not within two years from the time the blow was struck, was too late, and the action barred by 45 U. S. C., Sec. 56.

Clearly petitioner's cause of action is limited to injury from dust inhaled between November 25, 1938, and May, 1940, when his employment was terminated. Since he was employed for some thirty years, and he alleges he breathed this dust during all that time, it appears obvious that his silicosis is almost entirely due to dust inhaled prior to November 25, 1938. At some period prior to that time he must have suffered some injurious effects, whether realized or not, and it was at that time that his cause of action accrued. The action had ceased to exist by reason of the

limitation on the right creating it. No action existed when this suit was instituted on November 25, 1941.

VIII.

Since the transcript of record does not contain the judgment or opinion of the Supreme Court of Missouri on first appeal, it cannot be affirmatively determined that a decision of a federal question was necessary to a determination of the cause or that the judgment was not final, so as to permit review on certiorari from the final judgment in the second appeal.

Petitioner seeks a review of the judgment on the first appeal on the theory that he did not then have a right of review because the judgment was not final. But if the judgment on first appeal were final or did not involve a federal question, then it could not be reviewed on certiorari from judgment in the second appeal. *Rio Grande Western R. Co.* v. *Stringham*, 239 U. S. 44, 36 S. Ct. 5, 60 L. Ed. 136.

Only final judgments involving a federal question can be reviewed on certiorari to a state court (28 U. S. C., Sec. 344(b)). A state court judgment will not be reviewed until these jurisdictional facts appear from the record. *Herb* v. *Pitcairn*, 324 U. S. 117, 128, 65 S. Ct. 459, 89 L. Ed. 789; *Williams* v. *Kaiser*, 323 U. S. 471, 477, 65 S. Ct. 363, 89 L. Ed. 398.

It is the judgment and not the opinion which is reviewed and, while the opinion may now be examined to determine the basis for the judgment, the opinion properly authenticated must appear as a part of the record. *Loeb* v. *Trustees of Columbia Twp.*, 179 U. S. 472, 481, 21 S. Ct. 174, 45 L. Ed. 280; *Reinman* v. *Little Rock*, 237 U. S. 171, 179, 35 S. Ct. 511, 59 L. Ed. 900.

Petitioner has not seen fit to print as a part of the transcript of record either the judgment or opinion of

the court on first appeal. The opinion appears only by reference to the reported opinion. In this state of the record the judgment on first appeal cannot be here reviewed.

IX.

Certiorari should be denied.

Rule 38, par. 5, of this Court provides in part:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

While this Court has not heretofore determined whether or not an action can be maintained for silicosis under the Federal Employers' Liability Act or Boiler Inspection Act, it has many times announced the principles governing recovery. There is no limit to the types and variety of damages that may be alleged in personal injury actions under those Acts. The novelty of the case is not an adequate ground for the grant of certiorari.

Congress made discretionary the grant of certiorari to ease the burden of this Court. That burden will not be eased if certiorari is granted in all actions under the Federal Employers' Liability Act where it is held that no case has been made for a jury. No preference should be given actions under that Act over litigation involving other federal statutes. *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, 354-359, 63 S. Ct. 1062, 87 L. Ed. 1444, dissenting opinion of Mr. Justice Roberts, joined by Mr. Justice Frankfurter, and concurring opinion of Mr. Chief Justice Stone.

A jury has found that petitioner is suffering from silicosis, rather than pulmonary tuberculosis, as contended

by respondent, and that his condition was caused by reason of his employment (R. 23-24, R. 9-10, Instruction No. 1, R. 12, Instruction No. U). Respondent must accept that verdict. However, his condition only comes within the proper sphere of compensation legislation. But Congress has not seen fit to enact a compensation law for seamen and railroad employees as it has for longshoremen and harbor workers. As stated in the dissent of Mr. Justice Frankfurter, joined by Mr. Justice Jackson and Mr. Justice Burton, in *Johnson* v. *United States*, 68 S. Ct. 391, l. c. 396:

> "But so long as Congress sees fit to have liability for injuries by railroad employees and seamen based solely on proof of fault, it is not for this Court to torture and twist the law of negligence so as to make it in result a law not of liability for fault but a law of liability for injuries."

Petitioner could not make a case of common law liability for negligence under the Federal Employers' Liability Act. He therefore sought to recover for a violation of the Boiler Inspection Act which would be negligence *per se* and which would eliminate the necessity of providing the elements of common law negligence and would avoid diminution of damages for contributory negligence. But the Boiler Inspection Act was enacted to promote the "safety" of employees from "accidental injury" and was not enacted to protect employees from occupational diseases. Therefore, the Act cannot be invoked by petitioner to recover for silicosis—an occupational disease.

Wherefore respondent respectfully submits that, in the exercise of sound judicial discretion, certiorari should not be granted.

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APPENDIX.

Boiler Inspection Act.

The pertinent provisions of the Federal Boiler Inspection Act, and amendments, as originally enacted, are as follows:

(Chapter 103, 36 Statutes at Large, pp. 913-916)

"CHAP. 103—An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.

* * * * * * *

SEC. 2. That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

* * * * * * *

SEC. 5. That each carrier subject to this Act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after the approval of this Act. * * *

* * * * * * *

SEC. 8. That in the case of accident resulting from failure from any cause of a locomotive boiler or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the chief inspector. Whereupon the facts concerning such accident shall be investigated by the chief inspector * * *

The Interstate Commerce Commission may at any time call upon the chief inspector for a report of any accident embraced in this section. * * * Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.

Approved, February 17, 1911."

(Chapter 169, 38 Statutes at Large, p. 1192)

"CHAP. 169—An Act to amend an Act entitled * * *

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two of the Act entitled * * * shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof.

SEC. 2. That the chief inspector * * * shall have the same powers and duties with respect to all the parts and appurtenances of the locomotive and tender that they now have with respect to the boiler of a locomotive and the appurtenances thereof, and the said Act * * * shall apply to and include the entire locomotive and tender and all their parts with the same force and effect as it now applies to locomotive boilers and their appurtenances. * * *

Approved, March 4, 1915."

(Chapter 355, 43 Statutes at Large, pp. 659-660)

CHAP. 355—An Act to amend the Act entitled . . .

SEC. 2. Section 2 of such Act is amended to read as follows:

SEC. 2. That it shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

. . . . . .

Approved, June 7, 1924."

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129

No. 129

In the Supreme Court of the United States

OCTOBER TERM, 1948

WILLIAM T. URIE, PETITIONER

v.

GUY A. THOMPSON, TRUSTEE OF THE MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENT

ON CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

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The Interstate Commerce Commission respectfully submits this brief as *amicus curiae* for the purpose of furnishing the court with certain technical and other information within its possession bearing on the questions involved and of making certain suggestions of a general nature, which may be of assistance to the court in deciding the issues presented.[1]

The case is one under the Federal Employers' Liability Act, and the wrong relied upon for the recovery of damages is an alleged violation of the

[1] In granting the writ of certiorari on October 11, 1948, the court instructed the clerk to call our attention to the pendency of the case.

Boiler Inspection Act and of certain of the regulations of the Commission thereunder, as the result of which, it is alleged, petitioner contracted pneumoconiosis or silicosis. There is no challenge of the authority of the Commission under the Boiler Inspection or other Act nor of the validity of any rule or regulation of the Commission under the Boiler Inspection Act or any order or other action of the Commission. Nor is there any question of the jurisdiction of the Commission; for, while it has certain powers and duties under the Boiler Inspection Act, cf. *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 612, it is, of course, wholly without jurisdiction to determine the merits of claims for damages of this nature.

In view of these facts and of the nature of this case, we feel that this presentation should be confined to (1) a brief analysis of the Boiler Inspection Act and the history of its provisions, (2) a statement of the pertinent rules and regulations of the Commission under that Act, (3) certain suggestions regarding the alleged violations of the Boiler Inspection Act and the Commission's rules thereunder, together with explanation of technical terms used to describe the locomotive appliances alleged to have been in improper condition, (4) references to the reports of the Commission in proceedings under the Boiler Inspection Act, and (5) the reasons for the rules of the Commission alleged to have been violated in this case.

1. The Boiler Inspection Act

The Act known as the Boiler Inspection Act or the Locomotive Inspection Act was originally enacted February 17, 1911 (c. 103, 36 Stat. 913). It was entitled "An Act To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto." In its original form it applied only to the boilers of steam locomotives and their appurtenances.

Four years later it was amended (c. 169, 38 Stat. 1192, approved March 4, 1915) so as to provide that it shall apply to and include the entire locomotive and tender and all their parts and appurtenances.

Since the original Act applied only to locomotives propelled by steam power, the amendment of 1915 was, at the time of its enactment, likewise limited in its application. But in the amendment of June 7, 1924 (c. 355, 43 Stat. 659), this restriction was removed and the law was made to apply to all locomotives used or permitted to be used on the line of any carrier subject to the Act, regardless of the power by which they are propelled. See *Napier v. Atlantic Coast Line, supra*, 272 U. S., p. 608; *United States* v. *B. & O. R. Co.*, (Power Reverse Gear case), 293 U. S. 454. See also report of the Commission entitled *Rules for Testing Other than Steam Power Locomotives,*

122 I. C. C. 414 (1927), which explains the changes in the Act up to that time.

Since 1924 there have been several minor amendments of the Act but no material change in its substantive provisions.[2]

The original Act was in ten sections. Section 10, relating to appropriations to carry out the Act, was repealed by section 5 of the Act of June 7, 1924. The remaining nine sections, together with section 2 of the Act of March 4, 1915 (which enlarged the duties of the inspectors) are reproduced in 45 U. S. Code in thirteen sections, numbered 22–34.

Section 1, as amended June 7, 1924 (45 U. S. C., sec. 22) defines the terms "carrier" and "common carrier" as used in the Act as meaning "a common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the Interstate Commerce Act, as amended, excluding street, suburban, and

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[2] The amendments since 1924 are as follows:

June 27, 1930 (c. 644, 46 Stat. 822), merely adjusting salaries of chief and assistant chief inspectors.

April 22, 1940 (c. 124, 54 Stat. 148), changing the titles "chief inspector" and "assistant chief inspector" to "director of locomotive inspection" and "assistant director of locomotive inspection," respectively, wherever those terms were used in the Act. That amendment also struck out "of locomotive boilers" in the first sentence of section 3 and in section 9 of the original Act.

May 27, 1947 (c. 85, 61 Stat. 120), relating merely to salaries.

One other earlier amendment, approved June 26, 1918 (c. 105, 40 Stat. 616), merely adjusted salaries of inspectors.

interurban electric railways unless operated as a part of a general railroad system of transportation."

Section 2, as amended March 4, 1915, and June 7, 1924 (45 U. S. C., sec. 23), contains a general substantive provision reading:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

This section, as will be noted, contains two important general provisions. First, the locomotives, tenders, and all appurtenances must be *in proper condition and safe to operate* in the service to which they are put and may be employed in active service *without unnecessary peril to life or limb.* Second, they must be inspected as required by subsequent provisions of the Act and be able to withstand such tests as may be prescribed in the rules and regulations provided for in subsequent provisions.

Sections 3 and 4, as amended June 26, 1918, June 7, 1924, June 27, 1930, and April 22, 1940 (45 U. S. C., secs. 24, 25, 26, and 27), provide for the appointment of a director and two assistant directors of locomotive inspection, and not over 65 inspectors, and define their duties.

Section 5, as amended and enlarged, in connection with sections 2 and 6, provides for rules, instructions, and regulations for the inspection of locomotives, and authorizes the Commission to approve or initiate regulations. See *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 611–613, and *U. S.* v. *B. & O. R. Co.*, 293 U. S. 454, 458–9, 461–2.

Section 6, as amended April 22, 1940 (45 U. S. C., sec. 29), relates to the duties of district inspectors, inspection and repairs by carriers, notice to carriers of condition of boilers, appeals to director and reexamination, and further appeal to the Commission.

Section 7, as amended April 22, 1940 (45 U. S. C., sec. 31), provides for annual reports by the Director of Locomotive Inspection to the Commission.

Section 8, as amended April 22, 1940 (45 U. S. C., secs. 32 and 33), provides for reports by carriers to Director of Locomotive Inspection as to accidents resulting from failure from any cause of a locomotive or its appurtenances resulting in serious injury or death to one or more persons,

investigation and report thereon by Director, and reports of such accidents by Commission.

Section 9, as amended April 22, 1940 (45 U. S. C., sec. 33), provides for penalties for violations of the provisions of the Act or any rule or regulation made thereunder, or any lawful order of any inspector.

2. Rules and regulations of the Commission under the Boiler Inspection Act

Rules for the inspection and testing of steam locomotive boilers and their appurtenances were approved by the Commission, pursuant to the original Act, on June 2, 1911, to become effective July 1, 1911.[3]

After the Act was extended to cover the entire locomotive, by the 1915 amendment, the Commission, by order of October 11, 1915, approved rules and instructions for the inspection and testing of steam locomotives and tenders and their appurtenances, effective July 1, 1916.[4]

Pursuant to the enlargement of the Act by the 1924 amendment to apply to all locomotives, the Commission adopted and promulgated separate rules for the inspecting and testing of locomotives other than steam, by order of December 14, 1925, effective July 1, 1926.[5]

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[3] See Annual Report, I. C. C., 1911, pp. 88–89.

[4] See Annual Report, I. C. C., 1916, p. 56 et seq.

[5] See Annual Report, I. C. C., 1926, p. 75.

These rules have been amended from time to time, by subsequent orders of the Commission. As so amended they are still in force. The rules in effect on June 1, 1938, are published in 49 C. F. R. 91.1 et seq., pp. 1233 et seq. Subsequent changes are shown in 49 C. F. R., Cum. Supp., pp. 12189 et seq.[6]

Only the rules relating to steam locomotives appear pertinent here, in view of the fact, noted in the opinion of the court below, that "Plaintiff had worked on coal-burning engines." (R. 24.)

It further appears that only such of these rules as were in effect during the seven-year period from June 2, 1933, to May, 1940 are pertinent here. This appears from the facts, indicated by the record, that the defendant has been Trustee of the Missouri Pacific Railroad Company only since June 22, 1933 (R. 4), and that plaintiff left the service of the defendant in May 1940 (R. 2, 22). It also appears that plaintiff commenced work for the Missouri Pacific Railroad Company

[6] These rules have been published by the Commission in booklet form, and given wide publicity. One booklet, entitled "Laws, Rules and Instructions for Inspecting and Testing of Steam Locomotives and Tenders and their Appurtenances," publishes the rules regarding the boiler, these rules bearing numbers between 1 and 100. The same booklet also publishes the rules regarding the other parts of the locomotive, etc., numbered 101 up to 200. A second booklet, entitled "Laws, Rules, and Instructions for Inspection and Testing of Locomotives other than Steam," contains rules in the 200 and 300 series. These booklets have been republished from time to time by the Commission to include changes and amendments.

July 4, 1908, and was employed principally as a fireman on passenger locomotives operated on that part of the Missouri Pacific which extends from Joplin, Mo., to Kansas City, Mo. (R. 2, 22). Apparently it is not disputed that both plaintiff and defendant were engaged in interstate commerce in the operation of interstate trains.

Three of the Commission's rules, referred to in the opinion below (R. 26, 27, 28), appear to be directly involved in the case at bar, namely, Rules 101, 116 (a) and (g), and 120. These rules, which are still in effect and which were in force throughout the period involved in the case at bar, and which apply alike to passenger and freight steam locomotives, read as follows:

> Rule 101. The railroad company will be held responsible for the general design, construction, and maintenance of locomotives and tenders under its control.
>
> Rule 116. (a) *Cabs.*—Cabs shall be securely attached or braced and maintained in a safe and suitable condition for service. Cab windows shall be so located and maintained that the enginemen may have a clear view of track and signals from their usual and proper positions in the cab.
>
> (g) *Unnecessary openings in cab.*—Unnecessary or excessive openings in locomotive cabs around reverse levers, grate-shaker levers, pipes, rods, running boards, doors, windows, between cab and boiler, around wind sheets, or at any other place in cab or deck where rain, snow, or wind

may enter shall not exist on any locomotive used during the period from November 1, to April 1 within the territory specified in paragraph (d) [including Missouri].

120. *Sanders.*—Locomotives shall be equipped with proper sanding apparatus, which shall be maintained in safe and suitable condition for service, and tested before each trip. Sand pipes must be securely fastened in line with the rails.[7]

Rules 101 and 120 were first adopted by the above-mentioned order of October 11, 1915, and have since remained in force without change. Rule 116 was first adopted on the same date and then contained three paragraphs, designated (a), quoted above, and (b) and (c). The latter two rules, quoted in the margin,[8] do not appear to be directly pertinent here. As explained more fully hereinafter, Rule 116 (g) became effective

[7] That sanders are an important if not an essential part of locomotives is indicated by this rule requiring all steam locomotives to be equipped with proper sanding apparatus and also by the fact that the Commission's rules governing other than steam locomotives likewise require these safety devices. Rule 235 of the latter rules (49 C. F. R., 91.235) provides: "Each locomotive unit shall be equipped with proper sanding apparatus, which shall be tested before each trip. Sand pipes shall be securely fastened and arranged to deliver the sand on the rails in front of the wheel contact."

[8] "(b) Road locomotives used in regions where snowstorms are generally encountered shall be provided with what is known as a 'clear vision' window, which is a window hinged at the top and placed in the glass in each front-cab door or window. These windows shall be not less than 5 inches high.

November 1, 1928. It has since remained in force without change.

In addition to the above-mentioned rules, attention is called also, to the following rules (which rules have been in effect since prior to 1933):

(102). The mechanical officer in charge, at each point where repairs are made, will be held responsible for the inspection and repair of all parts of locomotives and tenders under his jurisdiction. He must know that inspections are made as required and that the defects are properly repaired before the locomotive is returned to service.

(103). The term "inspector" as used in these rules and instructions means, unless otherwise specified, the railroad company's inspector.

(104). Each locomotive and tender shall be inspected after each trip, or day's work, and the defects found reported on an approved form to the proper representative of the company. This form shall show the name of the railroad, the initials and number of the locomotive, the place, date, and time of the inspection, the defects found, and the signature of the employee making the inspection. The report shall be ap-

located as nearly as possible in line of the enginemen's vision, and so constructed that they may be easily opened or closed."

"(c) Steam pipes shall not be fastened to the cab. On new construction or when renewals are made of iron or steel pipe subject to boiler pressure in cabs, it shall be what is commercially known as double strength pipe, with extra heavy valves and fittings."

proved by the foreman, with proper written explanation made thereon for defects reported which were not repaired before the locomotive is returned to service. The report shall then be filed in the office of the railroad company at the place where the inspection is made.

In connection with Rules 101 to 104 attention is invited to the report entitled *Inspection of Locomotive Boilers*, 73 I. C. C. 761 (1922) which indicates the extent to which the Commission through its inspectors has been able to inspect locomotives. At that time the Act authorized the appointment of only fifty inspectors. The amendatory Act of June 7, 1924, authorized fifteen additional inspectors.

3. Alleged violations of Boiler Inspection Act and rules thereunder in case at bar

Petitioner, in his fourth amended petition for damages (R. 1–4), after quoting section 2 of the Boiler Inspection Act, alleged (R. 3–4), that his "said injuries and conditions were directly caused by the defendant's violation of said Boiler Inspection Act because said locomotives, which defendant used, were in improper condition and unsafe to operate in the service, and when their conditions constituted an unnecessary peril to plaintiff's life and limb in that when—

1. Said dust and sand would and did enter into and permeate the cabs and decks

of said locomotives in quantities that were harmful to the plaintiff to breathe, inhale and absorb.

2. The sanders and sanding devices of said locomotives would loose and let out sand and so that harmful quantities of sand would and did come from the same when set in operation and when (a) the partitions or humps in the sand traps were out of adjustment, or were worn, (b) the sand domes or sand containers or sand boxes were loose at the boiler connections, (c) the sand pipes break [sic] or were broken off or were loose or were perforated, (d) the valves or traps holding said sand were not in proper mechanical condition and were not properly adjusted.

3. The decks and connections on such locomotives would and did permit said dusts and sand to enter into said cabs of said locomotives in quantities harmful to plaintiff when (a) the connections between the boiler and the deck were old, worn, or loose, (b) the grate-staff riggings were without covers, or (c) when such covers thereon were warped, or bent, or did not fit, (d) the floor boards were worn, or loose, or contained open spaces.

4. The defendant failed to maintain said locomotives, cabs, decks, and the places where plaintiff was required to work in safe condition.

As this court knows judicially,[2] the sanding apparatus of a locomotive consists of devices which enable the engineer to apply sand to the rails under the driving wheels of the locomotive, as needed, in order to increase the adhesion, and prevent the driving wheels from slipping. The apparatus consists of various parts, including primarily a receptacle to carry the sand. This receptacle, called a sand box or dome, is a water-tight compartment, with a capacity, depending upon the size and type of the locomotive, of from approximately one to two barrels of sand. It is usually placed on the top of the locomotive near the front end, between the smoke stack and the steam dome.

The sand runs by gravity through short nipples on either side of the sand dome to the sand traps. These traps are usually called "sanders." Small air pipes or tubes lead from the sand traps to the control valve in the cab of the locomotive. This valve in turn is connected by a pipe to the compressed air tanks on the locomotive. When the engineer opens the valve a certain quantity of compressed air is forced to the sand traps, which blows the sand from the bottom of the trap and over the hump therein and down through the "sand pipes" to a point immediately in front of

[2] The evidence introduced at the trial is not included in the transcript of the record before this Court. Some of the evidence is stated in the opinion of the court below (see R. 22-24) but there is no description of the locomotive parts mentioned therein.

the driving wheels. The sand traps are equipped with "humps" to prevent the sand from running continuously down the sand pipes by gravity. Depending upon its type, a locomotive may be equipped with two or three pairs of sand traps and pipes, one pair fastened in front of the first set of driving wheels, another pair immediately to the rear of the last set of driving wheels (for use in backing the locomotive), and, possibly, another pair immediately in front of a third set of driving wheels, if the locomotive has three or more pairs of driving wheels.

Attention is called in this connection to the opinions in *Anderson* v. *B. & O. R. Co.* (2 C. C. A.), 89 F. 2d 629 (1937) and 96 F. 2d 796 (1938), which give a clear description of a typical locomotive sanding apparatus. That case is analogous to the present case to the extent that it was one under the Federal Employers' Liability Act and relied upon a violation of section 2 of the Boiler Inspection Act and the Commission's Rule 120 relating to sanders. The action was brought by plaintiff's decedent who met his death while employed by the defendant as a fireman on a pusher engine coupled to the rear of an interstate freight train. In its first opinion the court said that the correctness of the ruling of the District Court in directing a verdict for defendant was the sole matter presented by the appeal and that it raised two ques-

tions: "(1) Whether there was any evidence of a violation of the Boiler Inspection Act and Rule 120 promulgated thereunder, and (2) whether, if there was, the jury could be permitted to find that such violation was the proximate cause of the fireman's death." In discussing the first question the court described the sanding apparatus on the engine, as follows; p. 630:

> The pusher engine was equipped with a sanding apparatus, consisting of two sand-boxes above the boiler, from each of which two pipes of an inch and a half diameter led down, one either side of the engine, to a point two inches above the rail and two inches in front of the forward drive wheel of each set of drivers. Before the trip started the apparatus was tested and found to be working satisfactorily. After having proceeded about thirteen miles to Stanley, a grade was reached on which it was necessary to use the sanders. Here it was found that the apparatus failed to deliver sand to the rails and that the drivers began to slip and spin until finally the train was stalled. There was evidence from which the jury might reasonably infer that before the train had come to a complete stop Anderson got off the engine on the left side and walked forward to the sand pipes for the purpose of tapping them with a pick to get the sand to flow; and that while stooping over to look at one of the pipes he got in the way of an engine of the Erie Railroad coming from the opposite direction

> around a curve on the adjacent track. He was struck by the pilot beam and instantly killed. After the train had stalled, Cobb, the engineer, tapped a little wet sand from the ends of each of the pipes on each side of the engine, and thereafter the sanders functioned properly to the end of Cobb's run.

The defendant contended that, since the evidence showed without contradiction that the sanders worked both before and after the accident, their temporary failure could not have been due to any mechanical or functional defect but resulted from the clogging of the sand at the end of the pipes because of weather conditions. Overruling this contention and holding on the issue of violation of the Boiler Inspection Act and Rule 120 that there was evidence enough to go to the jury, the court said, p. 630:

> It was a rainy day in July, but the rain was not of unusual or extraordinary severity. When the rails are wet is the precise time when the sanders are needed, and the plaintiff argues persuasively that an apparatus which will become clogged so that it cannot function during an ordinary summer rain does not comply with the rule requiring a "proper sanding apparatus, which shall be maintained in safe and suitable condition for service." The engineer testified that the sand is blown by air from the box through the pipes; that the flow of air is controlled by the operation of valves

> in the engine cab; and that the valves were wide open from the time the train left Stanley until it stalled. We think that the failure of the apparatus to function when operated in a proper manner and under normal working conditions makes a prima facie case of insufficiency either in the air pressure or in mechanical construction. The doctrine of res ipsa loquitur has frequently been applied to prove, in the absence of explanation, a violation of provisions of the Safety Appliance Acts (45 U. S. C. A., section 1 et seq.) * * * but a sanding apparatus which will not sand on a wet day in summer, when the valves are open and the sandboxes filled, is no better than none at all. No evidence was presented by the defendant that clogging of the pipes is unavoidable in wet weather, even though the apparatus be in perfect order.

In its opinion on the second appeal in that case (96 F. (2d) 796) the court described the sanding apparatus in greater detail, as follows, p. 797–8:

> The pusher engine upon which Anderson was employed as fireman was a Mallet compound engine equipped with Leach sanders. Above the boiler are two watertight sandboxes, each holding 30 to 50 gallons of dry sand. Joined to each box are two "traps," each trap serving a pipe on one side of the engine to discharge sand to the rail just in front of a set of drivers. The "trap" is divided into two compartments by a bridge.

The sand flows by gravity into one compartment and is supposed to rest there until agitated by the injection of compressed air through a nozzle in the side of that compartment, the air being controlled by the engineer through a valve in the cab of the engine. When the valve is opened some sand is blown over the bridge into the other compartment, with which the discharge pipe is connected, and slides down to the rail. There is some uncertainty in the testimony whether the sand falls wholly by gravity or whether the compressed air sets up some downward pressure in the discharge pipe. We think the jury might find that there is some slight downward pressure; several witnesses said that if there was too much air pressure the sand would be blown off the rails. The discharge pipe has an inside diameter of one and a quarter inches, and a large washer was mounted on the outside about two inches from the bottom to serve as a shoulder to prevent water running to the open end of the pipe in rainy weather. There was testimony that conditions of moisture may cause wet sand to clog the end of the pipe, in which case all that is needed is to tap it out with a hammer. There was also testimony that the sanders may fail because the nozzle in the trap becomes clogged; in that event no sand is blown over the bridge and it is necessary to open the trap and clear the nozzle with a wire.

> Cobb, the engineer, testified that he tested the sanders at D. C. Tower before the train started and found them working properly; that he used them to start the train and not at all thereafter until he reached the grade at Stanley, thirty minutes later. When he opened the valves at Stanley, although the gauge showed sufficient air pressure, it at once became apparent from the spinning of the drivers that the sanders were not functioning properly, and about a mile beyond the train stalled.

The only rule of the Commission which seems directly relevant to plaintiff's allegations (specification No. 2, R. 3) regarding the sanding apparatus of defendant's locomotives on which plaintiff worked as fireman during the 7-year period in question is Rule 120, *supra*, which requires that locomotives shall be equipped with "proper" sanding apparatus, that this apparatus shall be maintained "in safe and suitable condition for service," and shall be tested before each trip; further, that the sand pipes must be securely fastened in line with the rails.

It appears that plaintiff does not rely upon the failure of the sanding devices to operate in the performance of their mechanical function to deliver sand to the rails whenever, in the judgment of the engineer, sand is needed, but rather, that because parts of the devices were loose or broken or perforated, an unnecessary or excessive amount of sand was released.

The "grate-staff riggings" referred to in paragraph numbered 3 of the plaintiff's petition, quoted above, we think refers to the grate-shaking rig, which is an apparatus attached to the movable grate bars of shaking or rocking grates, by which they are moved back and forth, with a rocking motion, to disturb the fire over the whole area of the grate, to effect proper combustion. The grate-shaking rig is operated by means of a suitable lever placed in the cab. The lever is ordinarily detachable, and, usually, a locomotive is provided with a cover, which may be box-like in shape, or a piece of flat metal, which may be used to close, as near as may be, the necessary openings in the cab floor for the grate-shaker bars.[10]

The only rule of the Commission which seems directly relevant to plaintiff's specification No. 3 (R. 3–4) relating to the condition of the locomotive cabs, is Rule 116, *supra,* and particularly paragraph (g), which prohibits *unnecessary* or

[10] *Encyclopedia Americana*, Vol. 17, pp. 541–544, contains a descriptive list of the principal parts of a modern locomotive, including, on p. 543, sand box, sand pipe, grates and grate-shaking rigs. The *Locomotive Cyclopedia, 1947* (compiled and edited for the Association of American Railroads and published by Simmons-Boardman Publishing Corp., 30 Church Street, New York 7, N. Y.) contains a "Dictionary of Locomotive Terms," pp. 11–96, and descriptive articles and data in regard generally to boilers, including grate shakers and rigging, section 5, pp. 432–438; cabs, cab fittings, and boiler mountings, section 6, including cab arrangements, pp. 450–462; cab curtains, pp. 464–465, and sand boxes and samlers, i. e., sand traps, pp. 496–505.

excessive openings in locomotive cabs during the five colder months of the year within the northern territory specified in Rule 116 (d), which includes roughly all that part of the United States north of the southern boundary of Missouri. The rule itself indicates that rain, snow, or wind may enter at various places in the locomotive cab or the deck (floor) thereof, including openings around reverse levers, grate-shaker levers, pipes, rods, running boards, doors, windows, between cab and boiler, and around the wind sheets.

4. Reports of Commission in proceedings under the Boiler Inspection Act

Shortly after the decision of this Court in *Napier* v. *A. C. L. R. Co.*, 272 U. S. 605, November, 1926, the complaint in *Wisconsin R. R. Comm.* v. *A. & R. R. R. Co.* was filed, and on May 7, 1928, the Commission rendered its report, 142 I. C. C. 199. It found that the safety of employees and travelers upon railroads required (1) that in certain specified northern territories steam locomotives and tenders have suitable cab curtains; (2) that unnecessary or excessive openings about locomotive cabs be closed during the winter months; (3) that oil-burning locomotives do not take air into the firebox from the interior of the cab; and (4) that steam locomotives used in road service have a suitable storm window attached to side cab windows.

In its report there the Commission explained, p. 202, that "Various parts and appurtenances which must be operated or observed by the engineer or fireman, or both, are located within the cab. In some cases these parts extend beyond the cab, while in others they are connected by pipes, rods, or levers which extend beyond the cab, and in such cases an opening in the cab is necessary." On this subject the Commission further said (p. 203), "If openings exist in cab around pipes or levers, between cab and boiler, or around windows or doors, the wind, rain, and snow may enter the cab regardless of curtain equipment. The space within the cab is limited and it may be said with substantial correctness that the engineer and fireman are exposed to whatever wind, rain, and snow enters the cab." The Commission further said, p. 203: "When locomotives are moving at a high rate of speed, wind, rain, and snow will enter the cab through the smallest opening, and under certain conditions it is practically impossible to so fit the parts of the cab or to arrange the curtains so as to exclude all of the wind, rain, and snow."

After setting out the above facts and others, the report proceeded to consider the question whether profection of the enginemen against inclement weather required cab curtains, and in that connection said, p. 203:

It is so obvious that enginemen cannot as safely and properly perform their duties when cold or wet as when dry and warm that comment upon this proposition seems unnecessary.

On page 204 the Commission said:

The cabs of locomotives are usually constructed of metal. Numerous openings are necessary therein. It is usually necessary that enginemen open the windows in order to observe signals and perform other duties.

Later in the report the Commission discussed the matter of unnecessary openings in the cab and in this connection said, p. 209:

It is evident that in many instances the openings in the cab are much larger than necessary and that in many cases the remaining space could be entirely and substantially closed by the use of a suitable material or device. In other cases openings are permitted to remain although not used. Unnecessary or excessive openings are often permitted around reverse lever, grate-shaker levers, and between cab and boiler. Often cab windows and doors are not properly fitted and unnecessary or excessive openings are thus created. The importance of closing these unnecessary or excessive openings is illustrated by testimony to the effect that snow will sift into the cab through any opening that will permit wind to enter, and around cab doors and windows

which are closely fitted." Much of the snow entering the cab is changed into vapor which settles upon the enginemen causing them to become wet. This vapor also settles upon the cab windows causing them to become frosted, which interferes with the vision of the enginemen.

It is clear from the record that unnecessary openings permit wind, rain, and snow to enter the cab. The engineer and fireman cannot escape the effects thereof. There is no disagreement as to the necessity of closing such openings and they should be kept closed during the winter months.

In considering the necessity for storm windows, the Commission said, p. 210:

To properly observe signals and perform their duties it is necessary that the engineer keep the side cab window open during much of the time regardless of inclement weather. The same is true with respect to the fireman except to a lesser degree. In order to protect the engineer and fireman from the wind, rain, and snow when the locomotive is running at a high rate of speed and the side cab windows open many of the carriers have attached

[11] *Locomotive Cyclopedia*, *supra*, defines "cab door" as follows, p. 24:

"The movable partition which closes the opening in the front of a cab leading out to the running board. It is usually hinged to swing outward and has glass in the upper panel. Cab back doors are sometimes used to close the opening between the cab and tender, but generally a curtain is used."

> to the side cab windows or to the sides of the cab a small storm window or wind shield. This storm window, or wind break, as it is sometimes called, is approximately 5 inches wide and 18 inches in height and is hinged at the side and can be folded back against the window when not in use. These windows give much needed protection to enginemen and that they are necessary is not disputed upon the record. They should be installed and maintained on all locomotives used in road service.

With the report in that proceeding the Commission made an order, also dated May 7, 1928, which amended Rule 116, *supra*, by adding thereto paragraphs (d) to (i), inclusive, to become effective November 1, 1928. Paragraph (g) is quoted above. The other paragraphs (49 C. F. R. 91.116 (d), (e), (f), (h), and (i), pp. 1252–4) do not appear directly pertinent here.

The next case in which the Commission dealt with the subject of locomotive appliances was *Public Utilities Commission of Ohio* v. *Pennsylvania R. Co.*, 151 I. C. C. 448 (1929). It there required that steam locomotives, except those using oil fuel, should be equipped with mechanically operated fire doors, so constructed and maintained that they may be operated by pressure of the foot on a pedal, or other suitable appliance, located on the floor of the cab or tender at a suitable distance from the fire door, so that they may

be conveniently operated by the person firing the locomotive. After discussing the evidence on the question whether mechanically operated fire doors lessened materially the physical exertion required of firemen, the Commission reached the conclusion that they do and that they tend to prevent excessive fatigue. In considering the question before it the Commission drew an analogy from the intent of Congress in enacting the Hours of Service Act, p. 453:

> Congress has in the interest of safety placed certain limitations on the periods during which enginemen, among others, shall be required or permitted to continue on duty. The intent of Congress in enacting the hours-of-service act was to promote the safety of travelers and employees by limiting the hours of labor of those in control of dangerous agencies lest by excessive periods of duty they become fatigued, indifferent, or inefficient, and cause accidents leading to injuries and destruction of life. *United States* v. *Chicago, M. & P. S. Ry. Co.*, 197 Fed. 624; *United States* v. *Kansas City Southern Ry. Co.*, 202 Fed. 828; *United States* v. *Yazoo & M. V. R. Co.*, 203 Fed. 159; *United States* v. *Atlantic Coast Line R. Co.*, 211 Fed. 897; *United States* v. *Missouri K. & T. Ry. Co.*, 208 Fed. 957; *San Pedro, L. A. & S. L. R. Co.* v. *United States*, 213 Fed. 326; *United States* v. *Pennsylvania R. Co.*, 239 Fed. 576.

Thereupon the Commission made this finding, p. 453:

> It is generally recognized that locomotive firemen, especially on hand-fired locomotives, undergo greater physical exertion than practically any other class of employees engaged by the railroads. To lessen the physical exertion required of these men in the ordinary performance of their duties will promote safety, their health, and their comfort. Compare *Napier* v. *Atlantic Coast Line, supra.*

The ultimate conclusion of the Commission was expressed on page 467 as follows, speaking of mechanically operated doors:

> Their application and maintenance is necessary on all steam locomotives, not burning oil as fuel, in order that they may be used with safety and without unnecessary peril to life and limb and we so find.

In *Johnston* v. *Atlantic Coast Line R. Co.*, 190 I. C. C. 351 (1933), the Commission found that the safety of employees and travelers on railroads required that certain steam locomotives should be equipped with a suitable type of power-operated reverse gear. Its order amending its rule (No. 157) so as to give effect to its findings, was attacked in court proceedings and was set aside by this court in *United States* v. *B. & O. R. Co.*, 293 U. S. 454 because not supported by essential findings.

The opinion of this court in that case considered three principal questions. First, whether the Commission has authority to forbid the use of a locomotive equipped with a manually operated reverse gear. Second, whether the Commission has any authority to make changes in the existing rules concerning reverse gears. Third, whether the Commission's findings were adequate. The court ruled in the affirmative upon the first two questions and in the negative upon the third.

In regard to the first question the court used the following significant language, pp. 458–59:

> The Commission clearly has authority, in an appropriate proceeding, to forbid the use of a locomotive equipped with a manually operated reverse gear if, by reason thereof, the engine is rendered unsafe or subjects employees of the railroad or others to "unnecessary peril to life or limb." The substitution of power operated reverse gear for manually operated reverse gear, might conceivably be found necessary to promote safety, even if it did so only indirectly by preventing the impairment of the health of engineers through excessive exertion or fatigue. To require the installation of power operated reverse gear is, in its nature, within the scope of the authority delegated to the Commission. For "the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction, and the material of every

part of the locomotive and tender and of all appurtenances." *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 611.

Regarding the second question, the court said *inter alia*; pp. 461–2:

> But the responsibility for rules adequate *to ensure safety* was imposed by Congress upon the Commission; and to discharge that duty, it was essential that the Commission, also, should possess the initiative in rule making. To this end, it was granted the power, not only of disapproving proposed rules, but also of requiring modifications of those in force. The power so conferred may obviously be exercised, as was done here, on complaint of the Brotherhood representing employees directly affected.
>
> In the *Napier* case, * * * we said: "The duty of the Commission is not merely to inspect. It is, also, to prescribe the rules and regulations by which the fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. * * *." [Italics supplied.]

In considering the third point the court made it clear that the Commission does not possess the broad legislative power to require the adoption on locomotives of such devices as, in its discretion, it may from time to time deem desirable, and that

its authority extends only to devices required to remove *unnecessary peril to life or limb*. In so holding the court said, pp. 462–4:

> The operation of an engine, however equipped, involves some "danger to life or limb." At common law the carriers were "free to determine how their boilers should be kept in proper condition for use without unnecessary danger." *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 529. And the Act conferred authority to prescribe by rule specific devices, or changes in the equipment, only where these are required to remove "unnecessary peril to life or limb." The power to make the determination whether the proposed device or change is so required, vests in the Commission. But its finding to that effect is essential to the existence of authority to promulgate the rule; and as Congress has made affirmative orders of the Commission subject to judicial review, *The Chicago Junction Case*, 264 U. S. 258, 263–265, the order may be set aside unless it appears that the basic finding was made. *Florida* v. *United States*, 282 U. S. 194.
>
> The primary question of fact presented for determination was, as the report of the Commission states, "whether the use of locomotives equipped with hand reverse gear, as compared with power reverse gear, causes unnecessary peril to life or limb." The report discusses, at some length, the alleged advantages and disadvantages of the

> two classes of reverse gear and the expense which the proposed change would entail; and concludes with "findings" that, to a certain extent, the change should be made. But whether the use of any or all types of steam locomotives "equipped with hand reverse gear as compared with power reverse gear causes unnecessary peril to life or limb," is left entirely to inference. This complete absence of "the basic or essential findings required to support the Commission's order" renders it void. * * *

Thereafter the proceeding before the Commission was reopened and further evidence was submitted. On June 8, 1937, the Commission rendered a further report, *Johnston* v. *Atlantic Coast Line R. Co.*, 222 I. C. C. 542. The issue for determination upon the enlarged record, the Commission said, p. 544, "is whether defendants, in using or permitting to be used in interstate commerce steam locomotives equipped with manual reverse gear instead of power reverse gear cause unnecessary peril to life or limb, in violation of the Boiler Inspection Act * * *." Finding that it has authority to initiate rules *adequate to ensure safety to employees and travelers on railroads* and that its authority extends to the establishment of a rule requiring the removal of appliances which it finds cause *unnecessary peril to life or limb* and the substitution therefor of appliances which it finds will promote the *safety* of employees

and travelers by rail, the Commission, p. 565, said:

> * * * The responsibility for rules adequate to insure safety to employees and travelers on railroads, with respect to operation of locomotives, is delegated by Congress to the Commission by the Locomotive Inspection Act, and to discharge that duty it is essential that the Commission possess the initiative in rule making. The Commission's quasi-legislative power under that act is exercised in the making of rules. *United States* v. *Baltimore & O. R. Co.*, *supra*. The Commission performs its functions in the interest of the general public rather than in the interest of particular litigants and it is our duty, under the Locomotive Inspection Act, not merely to inspect locomotives but also to prescribe the rules and regulations by which fitness of locomotives for service shall be determined. Thus the standard is set, and requirements imposed under that act. The power to require specific devices on locomotives has been extensively exercised. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 612. Our failure to establish a rule to provide for the removal of appliances which we find cause unnecessary peril to life or limb, and to substitute therefor appliances which we find promote the safety of employees and travelers by rail, would be an evasion of one of the important duties placed by statute upon us.

The Commission's ultimate finding and conclusion, expressed on p. 568, was that "the use on steam locomotives of manually-operated reverse gear as compared with power reverse gear causes unnecessary peril to life and limb and that the safety of employees and travelers on railroads requires that suitable power-operated reverse gear shall be substituted for manually-operated reverse gear." (The new order contemporaneously entered was not contested in court proceedings.)

Eleven years ago the Commission rendered its report in the last proceeding before it regarding locomotive appliances, *Johnston* v. *Atchison, T. & S. F. Ry. Co.*, 225 I. C. C. 519, decided December 7, 1937. In that report the Commission found that the use of coal-burning steam locomotives of certain classes in fast or heavy service (as defined in the report), when hand fired, causes unnecessary peril to life or limb of employees and travelers upon railroads, and that the safety of such employees and travelers requires that said locomotives shall not be used in such service unless equipped with automatic stokers or other mechanical means of supplying fuel to the fire. Near the end of this 33-page report is a summary of the conclusions reached by the Commission, pp. 549–51, which reads:

> 1. That under modern traffic and transportation conditions the safety of employees and travelers requires that a constant

lookout be maintained of the track and signals ahead of all railroad trains.

2. That construction of modern large and heavy hand-fired coal-burning locomotives is such that necessary lookout cannot be maintained at all times by the locomotive engineer, and that the time required to supply the fire with fuel and to perform other necessary duties makes it impossible for the fireman to maintain such lookout, often at critical periods when because of curvature of track, drifting smoke, passing of other trains, or other obstructions the engineer's view of signals, approaching vehicles at highway crossings, crossing watchmen, flagmen, landslides, rocks, or other inert objects on the track is obscured, resulting in unnecessary peril to life or limb of railroad employees and the traveling public.

3. That the intense glare from the open firebox door of heavy hand-fired coal-burning locomotives, into which the fireman must shovel from 2,500 to more than 8,000 pounds of coal per hour, often causes temporary fire blindness which prevents firemen from promptly distinguishing wayside signals such as block, train-order, interlocking-plant, or other fixed signals, classification lights on other trains, or various other signal lights which the safety of operation requires to be seen and correctly read.

4. That firebox explosions or backfires occasionally occur, and that men in the loco-

motive cab are burned or otherwise injured thereby.

5. That firemen on many hand-fired coal-burning locomotives operating to capacity perform much of their work within 3 feet or less of an open firebox within which the temperature ranges from 1,800° to 2,500°. That emergency conditions and their regular duties often require them to suddenly leave the cab and expose themselves to outside winter temperatures, occasionally for considerable periods, and that such exposures injure the health of firemen, particularly those of middle age or over who have been hand-firing for many years.

6. That no class of railroad operating employees perform labor that is comparable with the heavy labor performed by locomotive firemen, and this labor is substantially greater on the large coal-burning locomotives used in fast and heavy service. The act of firing a locomotive requires the transfer, by means of a scoop shovel, of quantities of coal, ranging on many runs from 10 to 25 or more tons, from the tender of the locomotive to the firebox, a maximum distance of more than 20 feet, and an average distance of from 12 to 15 feet. The coal must be evenly and skillfully distributed over grate areas ranging from 80 to 100 square feet at the time when the most efficient combustion will result. This and the many other duties necessarily performed in firing a locomotive, requires the expenditure of tremendous energy on the

part of the fireman, which results in excessive fatigue and often in permanent impairment of health which renders many men of middle age physically unable to continue hand-firing heavy locomotives."

This is followed by ultimate findings, as follows, p. 551:

> For the reasons above summarized, and others which are set forth in detail in this report, we find:
>
> That the use in fast or heavy passenger service, as defined herein, of hand-fired coal-burning locomotives which weigh on driving wheels 160,000 pounds or more, and the use in fast or heavy freight service, as defined herein, of hand-fired coal-burning locomotives which weigh on driving wheels 175,000 pounds or more, causes unnecessary peril to life or limb, and that the safety of employees and travelers on railroads requires that all such locomotives be equipped with a suitable type of mechanical stoker.
>
> We further find that, to prevent unnecessary peril to life or limb and to promote the safety of employees and travelers on railroads, all coal-burning locomotives of the above weights built on or after July 1, 1938, shall be equipped with a suitable type of mechanical stoker, and such stokers shall be properly maintained.
>
> We further find that, to prevent unnecessary peril to life or limb and to promote the safety of employees and travelers on railroads, all hand-fired coal-burning locomo-

tives of the above weights used in fast or heavy service, built prior to July 1, 1938, shall have a suitable type of mechanical stoker applied as provided herein.

* * * * *

An appropriate order amending our rules for the inspection and testing of steam locomotives and tenders and their appurtenances to give effect to these findings will be entered.

5. Reasons for rules 116 and 120

The Commission's Rule 120, regarding sanders, was adopted, as we have seen, by an order entered over 33 years ago, that is, on October 11, 1915, pursuant to the enlargement made by the Act of March 4, 1915, to cover the entire locomotive. The order was entered after a hearing but no report was issued with it, hence it cannot be said whether the Commission, in adopting Rule 120, considered the possibility of the enginemen contracting silicosis as a result of the construction or arrangement of the sanding apparatus. Indeed, there is nothing in any report of the Commission regarding the rules, instructions, or regulations for the testing of or for appliances upon locomotives (within our knowledge) which deals with the subject. Having been adopted pursuant to an act to promote the safety of employees and travelers upon railroads, it seems a reasonable inference that the rule, requiring all locomotives to be equipped "with proper sanding apparatus,"

to be maintained "in safe and suitable condition for service," and tested before each trip, was intended as a safety measure, designed to contribute toward achieving the purpose of the statute to promote the safety of employees and travelers by compelling interstate railroads to maintain their locomotives "in proper condition and safe to operate" in the service to which they are put "without unnecessary peril to life or limb."

The reasons for the additions to Rule 116, regarding cab curtains and the closing of unnecessary openings in the cab, were given in the Commission's report in *Wisconsin R. R. Com.* v. *A. & R. R. R. Co.*, 142 I. C. C. 199, *supra*. The above excerpts from that report show that the purpose of the new regulations there adopted was to promote the safety of employees and travelers by protecting the enginemen from inclement weather to enable them better to safely and properly perform their duties. The report does not indicate that the additional rules were intended to aid in guarding the engineer or the fireman from the harmful effects of inhaling sand or dust emitted from the sanding devices.

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